TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 587

THE UNITED STATES OF AMERICA, PETITIONER

vs.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1939
CERTIORARI GRANTED JANUARY 29, 1940

No. 9055

United States

Circuit Court of Appeals

For the Ninth Circuit.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Appellant,

vs.

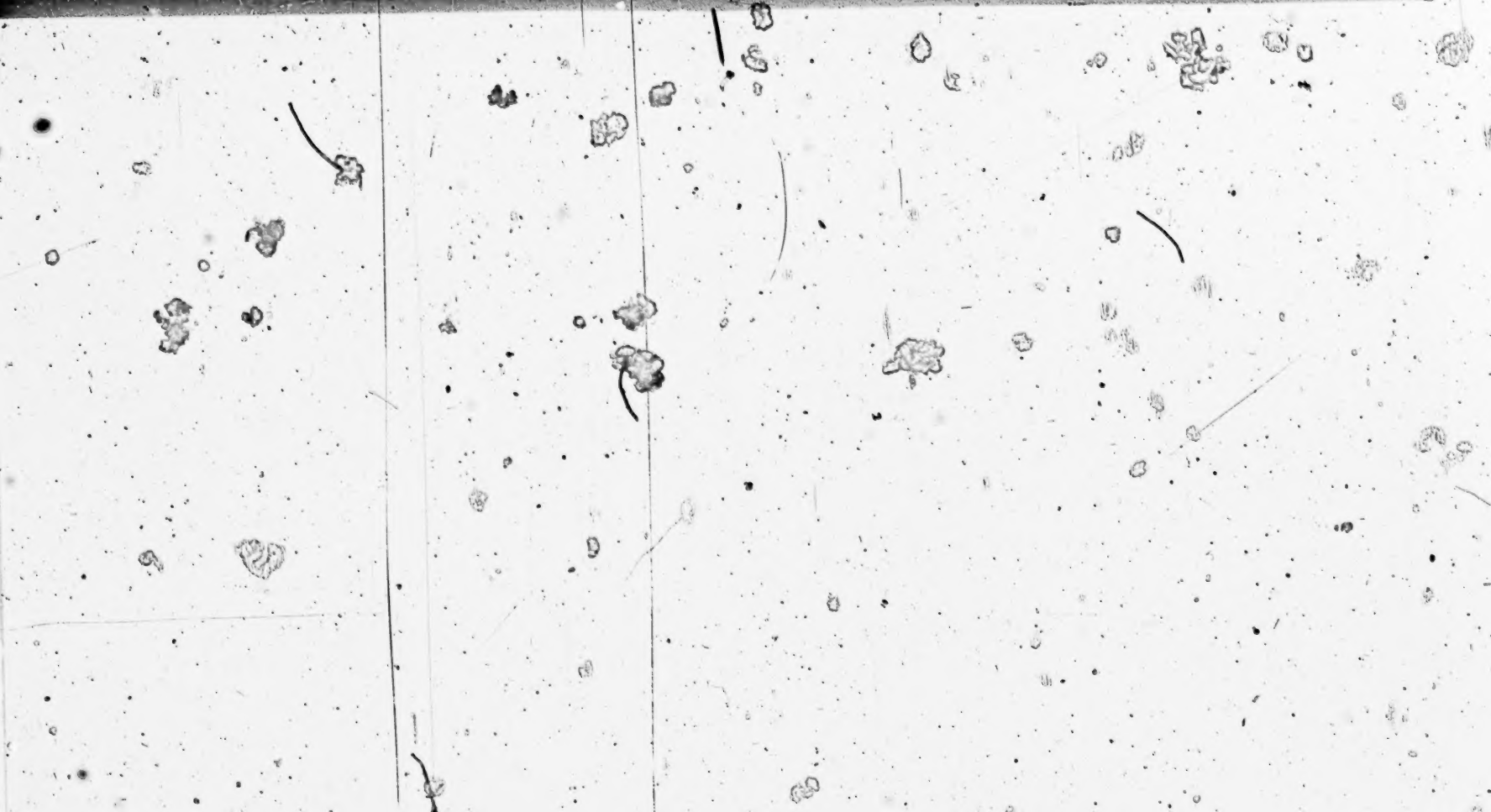
UNITED STATES OF AMERICA,

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOHN J. O'TOOLE,
City Attorney,

DION R. HOLM,
Assistant City Attorney,
City Hall,
San Francisco, California.

ROBERT M. SEARLS, Esq.,
225 Bush Street,
San Francisco, California.
Attorneys for Defendant and Appellant.

FRANK J. HENNESSY,
United States Attorney,

W. E. LICKING,
Assistant United States Attorney,
Post Office Building,
San Francisco, California.
Attorneys for Plaintiff and Appellee.

In the District Court of the United States in and for the Southern Division of the Northern Judicial District of California.

In Equity. No. 4173-R.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Defendant.

COMPLAINT FOR INJUNCTION, ACCOUNTING AND COMPENSATORY RELIEF.

To the Honorable Judge of said Court:

Comes now the United States of America, Plaintiff, by H. H. McPike, United States Attorney for the Northern District of California, its attorney, and upon application of the Secretary of the Interior of the United States and under direction and by authority of the Attorney General of the United States, complains of defendant City and County of San Francisco, a municipal corporation, and for cause of action alleges:

I.

That the United States of America, plaintiff herein, is [1*] now and at all times hereinafter mentioned was a sovereign body politic;

*Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

That the City and County of San Francisco, defendant herein, is now and at all times hereinafter mentioned was a municipal corporation organized and acting as such under and by virtue of the laws of the State of California and having its principal place of business as such in the City and County of San Francisco, within the jurisdiction of this Court;

III.

That this is a suit of a civil nature in equity brought by the United States of America to restrain defendant from continuing to enjoy, use and occupy certain rights, easements and lands granted it by plaintiff in a manner and for purposes prohibited by the express terms of the statute by which such rights, easements and lands were granted and contrary to the terms and conditions of its acceptance of said grant; and to recover as damages from said defendant the reasonable value of the use and occupancy of said lands and easements for the period of time during which it has wrongfully occupied and used the same, and for an accounting from said defendant of the profits received from said wrongful enjoyment, use and occupancy;

IV.

That on or about December 19, 1913, the Congress of the United States passed an Act (the Raker Act), entitled [2]

"An Act Granting to the city and county of San Francisco certain rights of way in, over, and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes."

A copy of said Act is hereto attached marked Exhibit 1 and by reference herein incorporated;

That by said Act there was granted to said defendant (subject to its acceptance of the terms and conditions thereof) certain rights, easements and lands, among which was the right to use certain water supply appurtenant to plaintiff's therein described lands for the development of hydro-electric power for the use of defendant's people; such necessary rights of way in, over and through lands of plaintiff therein mentioned as in the judgment of the Secretary of the Interior were required for the purpose of constructing, maintaining and operating power and electric plants, poles and lines for generation, sale and distribution of electric energy together with such lands, in locations therein described, as might be, by the said Secretary, determined actually necessary for power houses and all other structures or buildings necessary or properly incident to the construction, operation and maintenance of said water power and electric plants;

V.

That said grant with its terms and conditions was accepted by said defendant by an ordinance passed by its Board of Supervisors January 12, 1914; approved by its Mayor January 13, 1914, and by said defendant filed with the Secretary of the Interior January 21, 1914; [3]

VI.

That the defendant pursuant to the grant of said Act constructed upon plaintiff's lands power and electric plants together with buildings, transmission lines and other structures necessary to and used in connection with the development and transmission of electric power, and is now using and occupying said lands; that said lands are those contemplated in said Act to be granted to and used by said defendant according to the terms and conditions thereof, and are part of the public lands of the United States in Tuolumne, Stanislaus, San Joaquin and Alameda Counties in the State of California, and part of the lands of the United States in Yosemite National Park and Stanislaus National Forest within said State and all of which are within the Northern District of California; a more particular description of which said lands describing the same by legal subdivisions, metes and bounds (together with a map or plat thereof) will be hereafter filed herein as amendment hereto within the pleasure of your Honorable Court;

VII.

That defendant is now, and has since about June 29, 1925, been enjoying using and occupying the rights, easements and lands granted by said Act for the purpose of generating and transmitting electric power for sale, under color of said Act; [4]

VIII.

That defendant is now and since on or about June 29, 1925 has been enjoying using and occupying the said rights, easements and lands of plaintiff in evasion of and contrary to the aforesaid terms and conditions of said Act, more particularly section 6 thereof, in this that the defendant has since said date been and now is selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private corporation for and with the purpose and intent that the said corporation resell the same to its customer consumers, the people of said defendant;

IX.

That from time to time since June 29, 1925, the Secretary of the Interior has represented to defendant that its sale of said electric power to said Pacific Gas & Electric Company was in evasion of and contrary to the terms and conditions of said Act and has requested that defendant cease and desist from said practice;

X.

That notwithstanding said advice and requests the defendant has continued, and threatens to, and will in the future continue under color of said Act to so sell such electric power unless restrained by order of this Honorable Court;

XI.

That pursuant to the terms of said Act more specifically Section 9(u) thereof, the Secretary of the Interior [5] did on April second 1937 advise the Honorable Homer Cummings, Attorney General of the United States, of said failure and refusal of the defendant to comply with and observe the terms and conditions of said Act and did in writing request that suit be instituted for the purpose of enforcing and carrying out the same;

XII.

That this suit is instituted on behalf of the United States of America on direction of the Attorney General of the United States pursuant to said written request and under authority of the provisions of said Section 9(u) of said Act;

XIII.

That plaintiff is informed and believes and on such information and belief alleges that the said electric power so being sold by defendant in violation of the terms and conditions of said Act is of annual value in excess of Eight Million Dollars ($8,000,000.00), and that the same is being by de-

fendant sold to said corporation for a sum not in excess of $2,200,000.00 annually.

XIV.

That prior to the enactment of said Act the remaining unappropriated water resources appurtenant to the public domain of the United States (particularly those in and appurtenant to Yosemite National Park and the Stanislaus National Forest) had been reserved and set aside to be conserved and administered by the United States for the public benefit of its people, and that the express policy of the Federal government had been, then was, and now is, to conserve [6] and administer such resources for the benefit of the public and to prevent their control by private monopoly or for private profit;

XV.

That said Act was enacted by plaintiff, and its terms and conditions were accepted by defendant, with intent and for the purpose that the United States through the Secretary of the Interior might be enabled to safeguard the public interest in the rights, easements and lands thereby granted, and to thus carry into effect the governmental policy hereinbefore set forth;

XVI.

That such of those resources as were by the said Act granted to the defendant were granted to be by it utilized and developed for the use of its people and that the said electric power so developed by it

is by the aforesaid sale being by said defendant used for the benefit of said Pacific Gas and Electric Company, a private corporation, contrary to the terms and conditions of said Act and in derogation of the governmental policy therein recognized;

XVII.

That by reason of the aforesaid wrongful enjoyment, use and occupation by defendant of plaintiff's rights and lands, defendant has thereby defrauded and damaged, and continues to defraud and damage the plaintiff; [7]

XVIII.

That under color of said Act the defendant will continue as aforesaid to wrongfully enjoy, use and occupy said rights, easements and lands, and to sell to said corporation for resale the electric power thereby and thereon generated, and will thereby continue to defraud and damage plaintiff, unless and until restrained by your Honorable Court, and that the continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained;

XIX.

Defendant should cease to sell said electric power as aforesaid, or at all, except in accordance with the terms and conditions of said Act; or in default thereof it should cease to enjoy, use and occupy the rights, easements, and lands granted by said Act for the purpose of the development and transmission of electric power;

Defendant should render to plaintiff a full, true and accurate accounting of all said sales by them made of electric power to said Pacific Gas and Electric Company, and should pay over to plaintiff the profits thereof. The proceeds of any such sales made during the pendency of this litigation should by order of your Honorable Court be impounded or by said defendant paid into court;

XX.

Wherefore plaintiff is without an adequate remedy at law in that there is at law no remedy as complete, practicable and efficient to the end of the prompt administration of justice as the remedies of equity hereinabove sug- [8] gested, and that the intervention of equity will prevent a multiplicity of suits;

Plaintiff therefore prays: That your Honorable Court grant a Writ of Injunction, temporary until final hearing, and perpetual thereafter, directed to the defendant, its officers, agents, servants and employees enjoining and commanding them and each of them to cease from so disposing of said electric power contrary to the provisions of said Act or that in default thereof they and each of them cease from further trespassing on said lands of plaintiff now occupied by them and cease from use and enjoyment of the rights now used and enjoyed by them under color of said Act for the purpose of development and transmission of electric power;

That your Honorable Court enter a Decree directing that defendant be required to make full, just, true and complete account for all electric power produced and sold by it under color of said Act; and that such profits be paid over to plaintiff, and that pending this litigation the proceeds of such sales hereafter made be impounded or paid into the registry of this Court;

That the rights and claims of both parties in and under said Act with special reference to the sale and resale of electric power be determined;

That the plaintiff may have its costs and disbursements herein and for such other and further relief as to your Honorable Court shall seem meet in the premises.

H. H. McPIKE
United States Attorney [9]

United States of America,
Northern District of California—ss.

Personally appeared before me, J. P. Welsh, Deputy Clerk of the District Court of the United States for the Northern District of California, H. H. McPike, United States Attorney for the Northern District of California, attorney for the United States, the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing bill and knows its contents, and so far as the matters therein stated are of his own knowledge, the same are true, and that as to all matters therein

stated the same are true to the best of his knowledge, information and belief.

H. H. McPIKE

Sworn to and subscribed before me this 27th day of April, 1937.

[Seal] J. P. WELSH

Deputy Clerk of the United States District Court for the Northern District of California.[10]

EXHIBIT I

THE RAKER ACT

December 19, 1913.
(HR 7207) (Public No. 41)

Approved December 19, 1913.
38 Statutes at Large 241.

An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest and the public lands in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the City and County of San Francisco, a municipal corporation in the State of California, all necessary rights of way along such locations and of such

width, not to exceed two hundred and fifty feet, as in the judgment of the Secretary of the Interior may be required for the purposes of this Act, in, over and through the public lands of the United States in the counties of Tuolumne, Stanislaus, San Joaquin and Alameda, in the State of California, and in, over and through the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels and conduits for conveying water for domestic purposes and uses to the City and County of San Francisco and such other municipalities and water districts as, with the consent of the City and County of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this Act; for the purpose of constructing, operating and maintaining power and electric plants, poles and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating and maintaining telephone and telegraph lines, and for the purpose of constructing, operating and maintaining roads, trails, bridges, tramways, railroads and other means of locomotion, transportation and communication, such as may be necessary or proper in the construction, maintenance and operation of the works constructed by the grantee herein; together with such

lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation and maintenance of said water power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation and communication as may be established; together with the right to take, free of cost, from the public lands, the Yosemite National Park and the Stanislaus National Forest adjacent to its right of way, within such distance as the Secretary of the Interior and the Secretary of Agriculture may determine, stone, earth, gravel, sand, tufa and other materials of like character actually necessary to be used in the construction, operation and repair of its said water power and electric plants, its said telephone and telegraph lines, and its said means of locomotion, transportation or communication, under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park and the Stanislaus National Forest:

Provided, That said grantee shall file, as hereinafter provided, a map or maps showing the boundaries, location and extent of said proposed rights of way and lands for the purposes hereinabove set forth: Provided further, That the Secretary of the Interior shall approve no location or change of location in the national forests unless said location or change of location shall have been approved in writing by the Secretary of Agriculture.

Sec. 2. That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: Provided, however, That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes

of location of said rights of way or lands shall operate as an abandonment by the City and County of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps: And provided further, That any rights inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided for herein: And provided further, That with reference to any map or maps heretofore filed by said City and County of San Francisco or its grantor with any officer of the Department of the Interior or the Department of Agriculture, and approved by said department, the provisions hereof will be considered complied with by the filing by said grantee of copies of any of such map or maps with the register of the United States Land Office as provided for herein, which said map or maps and locations shall as in all other cases be subject to the approval of the Secretary of the Interior.

Sec. 3. That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or other existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining or

other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: Provided, however, that this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

Sec. 4. That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut or destroy any timber within the Yosemite National Park or the Stanislaus National Forest except such as may be actually necessary in order to construct, repair and operate its said reservoirs, dams, power plants, water power and electric works, and other structures above mentioned, but no timber shall be cut or removed from lands outside of the right of way until designated by the Secretary of the Interior or the Secretary of Agriculture, respectively; and it shall pay to the United States

the full value of all timber and wood cut, injured or destroyed on or adjacent to any of the rights of way and lands, as required by the Secretary of the Interior or the Secretary of Agriculture: Provided, That no timber shall be cut by the grantee in the Yosemite National Park except from land to be submerged or which constitutes an actual obstruction to the right or rights of way or to any road or trail provided in this Act: Provided, further, That for and in consideration of the rights and privileges hereby granted to it the said grantee shall construct and maintain in good repair such bridges or other practicable crossings over its rights of way within the Stanislaus National Forest as may be prescribed in writing by the Secretary of Agriculture, and elsewhere on public lands along the line of said works, and within the Yosemite National Park as may be prescribed in writing by the Secretary of the Interior; and said grantee shall, as said water works are completed, if directed in writing by the Secretary of the Interior or the Secretary of Agriculture, construct and maintain along each side of said right of way a lawful fence of such character as may be prescribed by the proper Secretary, with such suitable lanes or crossings as the aforesaid officers shall prescribe: And provided further, That the said grantee shall clear its rights of way within the Yosemite National Park and the Stanislaus National Forest and over any public land of any debris or inflammable material as directed by the Secretary of the Interior and the Secretary of Agricul-

ture, respectively; and said grantee shall permit any road or trail which it may construct over the public lands, the Yosemite National Park or the Stanislaus National Forest to be freely used by the officials of the Government and by the public, and shall permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain within the Yosemite National Park and the Stanislaus National Forest, or on the public lands, together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials: And provided further, That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

Sec. 5. That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements: Provided, however, That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and deter-

mine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: Provided further, That the Secretary of the Interior shall make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee: Provided further, That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations.

Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Sec. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be increased or diminished, pay the sum of $30,000 annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and

other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.

Sec. 8. That the word "grantee" as used herein shall be understood as meaning the City and County of San Francisco and such other municipalities or water district or water districts as may, with the consent of the City and County of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act.

Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee:

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute, the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; or, with reference to the Hetch Hetchy Reservoir, in the waters from the reservoir or waters entering the river between it and the "Early intake" of the aqueduct pending the completion of the aqueduct between "Early intake" and the Hetch Hetchy dam site.

Fourth. The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee.

Fifth. If at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.

(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District

and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.

(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water

as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: Provided, however, That at such times as the aggregate daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites; upon the express condition, however, that the said grantee may require the said

irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: Provided, however, That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior, the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: And provided further, That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of

stored water to be supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reasonable minimum as will assure the economical and beneficial use of such water.

(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolumne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

(i) That the said grantee shall, at its own expense, locate and construct, under the direction of the Secretary of the Interior, such weirs or other

suitable structures on sites to be granted, if necessary, by the United States; for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may direct, such apparatus and records to be open to inspection by any interested party at any time.

(j) That by "the flow," "natural daily flow," "aggregate daily natural flow," and "what is naturally flowing," as are used herein, is meant such flow as on any given day would flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed.

(k) That when the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height.

(l) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for

drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy, as follows: The said

grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or

other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed

by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine, above and along the proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its

proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site, and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and maintain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q.) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the

United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

(s) That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.

(t) That the grantee herein shall convey to the United States, by proper conveyance, a good and sufficient title free from all liens and encumbrances of any nature whatever, to any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act, said conveyance to be approved by and filed with the Secretary of the Interior within six months after the said grantee ceases to use such lands for the purpose of construction or repair under the provisions of this Act.

(u) That the City and County of San Francisco shall sell to the United States, for the use of the War Department, such water as the War Department may elect to take, and shall deliver the same

through its system in or near the City of San Francisco to the mains or systems of such military reservations in that vicinity as may be designated by the Secretary of War, under such rules and regulations as he may prescribe. In payment for such water and the delivery thereof the United States shall pay to the said City and County of San Francisco a rental, to be calculated at a fixed rate per one thousand gallons, said rate not to exceed the actual cost of said water to said City and County for all the water so furnished, as determined by meter measurements: And provided further, That payment of said rental shall be made by the local disbursing officer of the War Department in the usual manner: Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

Sec. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

Sec. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.

[Endorsed]: Filed Apr. 27, 1937. [11]

[Title of District Court and Cause.]

SUBPOENA AD RESPONDENDUM.

The President of the United States of America to City and County of San Francisco, a Municipal corporation, Greeting:

You Are Hereby Commanded, that you be and appear in the Southern Division of the United States District Court for the Northern District of California, aforesaid, at the Court Room in the City of San Francisco, within twenty days after service hereof, to answer a Bill of Complaint exhibited against you in said Court by United States of America.

and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable Michael J. Roche, Judge of said District Court, this 27th day of April, in

the year of our Lord one thousand nine hundred and thirty-seven and of our Independence the 161st.

[Seal] WALTER B. MALING,
Clerk.

By J. P. WELSH
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

You Are Hereby Required to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken Pro Confesso.

WALTER B. MALING,
Clerk.

By J. P. WELSH,
Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California—ss:

I hereby certify and return that I served the annexed Subpoena ad respondendum on the thereinnamed City and County of San Francisco, a Municipal Corporation, by handing to and leaving a true and correct copy thereof together with a copy of

Complaint, with Warren Shannon, as President of the Board of Supervisors of the City and County of San Francisco personally at San Francisco, Calif., in said District on the 28th day of April, A. D. 1937.

Marshal's Fees

Travel	$ .20
Service	$2.00
	$2.20

GEORGE VICE
U. S. Marshal.
By M. I. LYNCH
Deputy.

[Endorsed]: Filed Apr. 27, 1937. [12]

[Title of District Court and Cause.]

AMENDMENTS TO COMPLAINT

Comes now the plaintiff by H. H. McPike, United States Attorney for the Northern District of California and, as of course, (no answer or other pleading having been filed herein by defendant) amends its Complaint on file herein as follows:

I.

By inserting therein after the word "America", line 15, page 2 thereof the words "to enjoin the violation of a condition attached to the grant of certain rights in public lands;" [13]

II.

By inserting therein after the word "consumers", line 12, page 5 thereof the word "including";

III.

By inserting therein between paragraphs IX and X at page 5 thereof the following paragraph:

"IX-A.

"That on March 6, 1935, the said Secretary afforded to the said defendant, its officials and all interested parties a hearing to determine whether the condition expressed in section six of said Raker Act was by said defendant being violated; that said defendant at said hearing introduced evidence both oral and documentary and presented oral and written argument; that after a full and detailed consideration of said evidence and argument the said Secretary on August 24, 1935, rendered his decision that the disposition of electric energy under the terms of the contract of July 1, 1925, between the defendant and the Pacific Gas and Electric Company was in violation of said condition; that after said defendant was by said Secretary notified of said decision negotiations were conducted with said defendant by said Secretary with purpose to secure compliance with said condition; that such negotiations did not result in such compliance and that said Secretary on March 11, 1937 demanded of said defendant that it within fifteen days give assurance that said violation of said condition would cease;

that on March 30, 1937, said defendant through its Board of Supervisors refused to give such assurance and indicated that it would continue to so dispose of said electric energy." [14]

IV.

By adding thereto as Exhibit A thereof certain certified copies of the official maps of those lands generally described in paragraph VI of said Complaint which said maps are for the convenience of this court separately filed herewith and entitled Exhibit A to said Complaint;

V.

By adding thereto as Exhibit C thereof the attached photostatic copies of descriptions by legal subdivisions of the lands referred to in paragraph VI of said Complaint and delineated in Exhibit A filed herewith.

Wherefore, in consideration of the premises, plaintiff prays that the foregoing amendments be considered as and made a part of its complaint as if therein originally set forth, and that plaintiff have the relief as prayed for in said Compiaint.

H. H. McPIKE.
United States Attorney
W. E. LICKING
Assistant United States Attorney

Service of the within Amendment to Complaint by copy admitted this 25th day of June, 1937.

JNO. J. O'TOOLE
Attorney for Deft.
City & Co., S. F.

[Endorsed]: Filed Jun. 25, 1937.

The 20 pages of photostats attached to the original of this document are to be sent up to the Circuit Court of Appeals under an order for their transmittal made Nov. 7, 1938. [15]

[Title of District Court and Cause.]

ANSWER

Comes now defendant above named, and by way of answer to plaintiff's amended complaint in the above entitled action, admits, denies and alleges, as follows:

I.

Answering Paragraph IV of said complaint, defendant denies that under or by virtue of the provisions of the Raker Act referred to therein, there was granted to defendant the right to use a certain, or any, water supply appurtenant to the lands referred to in said Act for the development of hydro-electric power, or for the use of defendant's people. [16] On the contrary, it alleges that under the provisions of Section 11 of said Act, it was expressly stated by Congress that said Act should not be construed as affecting or intending to affect, or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation, or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of said Act was expressly directed to proceed in conformity with the laws of

said State of California. In this behalf, defendant further avers that all of the water rights acquired by, vested in, or used by defendant in the operation of its Hetch Hetchy project were acquired and vested, and are being used under and in conformity with the laws of the State of California and not by virtue of any grant or provision in said Raker Act.

II.

Answering Paragraph V of plaintiff's complaint, defendant admits the enactment by its Board of Supervisors and approval by its Mayor of said municipal ordinance passed on January 12, 1914, and the filing of the same with the Secretary of the Interior. Defendant denies, however, that under the provisions of said ordinance any terms or conditions were accepted giving the Secretary of the Interior control or direction of the defendant in the utilization of its water rights in connection with the Hetch Hetchy project or in the marketing of hydroelectric power and energy generated in conjunction with said project.

III.

Answering Paragraph VI of plaintiff's complaint, defendant denies that pursuant to the grant of said Raker Act [17] or otherwise, defendant constructed upon plaintiff's lands power and electric plants, together with buildings, transmission lines or other structures necessary to or used in connection with the development and transmission

of electric power except as hereinafter specifically enumerated; denies that the Moccasin power plant, which is the principal power plant generating electric energy on such Hetch Hetchy project, is situated on plaintiff's lands at all; alleges that said power plant is situated entirely on patented lands purchased and acquired by defendant from private owners thereof. Further answering Paragraph VI of said complaint, defendant alleges that the sole and total extent to which lands of the plaintiff are utilized in conjunction with the construction of said Hetch Hetchy project and generation of electric energy, is approximately as follows:

(1) Storage Reservoir Lands: Sixteen hundred eighty (1680) acres of public lands in Hetch Hetchy Valley and in Lake Eleanor Basin are utilized at present for water storage purposes. The fair market value of said lands so utilized as of the date of acquisition by defendant of the right to use the same is not in excess of Sixteen thousand eight hundred dollars. ($16,800).

(2) Diversion Reservoir Lands: Sixteen (16) acres of plaintiff's lands in the Stanislaus National Forest were flooded by the Early Intake diversion dam, and the fair market value of said lands as of the date of defendant's acquisition of the right to flood the same was and is One hundred sixty dollars ($160).

(3) Twenty (20) miles of aqueduct tunnel right of way through lands of the plaintiff was granted to and utilized by defendant under the terms of said

Raker grant, [18] having a fair market value as of the date of acquisition of the right to use the same, of Twelve hundred ten dollars ($1210).

(4) Three and one-quarter (3½) [sic] miles of aqueduct right of way was acquired by defendant from plaintiff under the terms of said Raker Act, in the Cherry River canyon, having a fair market value of Two hundred dollars ($200).

(5) Five (5) acres of plaintiff's lands in the bottom of the Tuolumne River canyon are occupied by the Early Intake Power Plant, built to furnish electric energy for construction purposes on the Hetch Hetchy project. Said site had a fair market value of Fifty dollars ($50) as of the date of acquisition by defendant.

(6) Forty (40) miles of power line transmission right of way were acquired by defendant from plaintiff, under the terms of said Act, and as of the date of the acquisition of the same had and have a fair market value of Two thousand four hundred twenty dollars ($2420).

(7) In addition to the foregoing, approximately not to exceed fifty (50) acres of land were temporarily allotted to defendant by plaintiff for construction of camp sites, and sixty (60) miles of rights of way for wagon roads and construction railroads. The reasonable value of such privileges does not exceed the sum of Six thousand one hundred fifty dollars ($6150).

The total approximate market value of the foregoing lands and rights as of the date of acquisition

of the same, under the terms of said Raker Act, did not and does not exceed the sum of Twenty-six thousand nine hundred ninety dollars ($26,990).

IV.

Answering the allegations contained in Paragraph VII [19] of plaintiff's complaint, defendant admits that defendant has since about June 29, 1925, been enjoying, using, and occupying the rights, easements, and lands granted by said Raker Act primarily for the purpose of constructing and operating a municipal water supply, but, as an incident thereto, for the purpose of generating and transmitting hydroelectric energy available in the development of said project, and that it has sold so much of said energy as was not required for its own purposes under the terms of said Raker Act.

V.

Answering the allegations of Paragraph VIII, defendant denies all and singular the allegations therein contained.

VI.

Answering the allegations of Paragraph IX defendant denies that since June 29, 1925, or at any other time other than hereinafter alleged, the Secretary of the Interior has represented to defendant that its sale of electric power to the Pacific Gas and Electric Company was an evasion of and contrary to, or an evasion of or contrary to the terms and conditions of the Raker Act and that defendant

was requested by the Secretary of the Interior to cease and desist, or cease or desist from the sale of said power to Pacific Gas and Electric Company and alleges further that during the month of December, 1930, defendant through its officers and agents at the request of Secretary of the Interior Honorable Ray Lyman Wilbur conferred with said Secretary on the matter of the distribution of said hydroelectric power but that said Secretary made no order or request upon defendant to cease distributing the same, as it was doing. Alleges that such representation was made by the Honorable Harold L. Ickes, Secretary of the Interior, on or about the 24th day of August, 1935. [20]

VI-A.

Answering Paragraph IX-A in Amendments to Complaint filed herein, the defendant alleges that the decision of the Secretary of the Interior therein referred to is irrelevant matter included in the complaint by amendment, and furthermore alleges that the decision of the Secretary rendered as in said paragraph stated on August 24, 1935, in which he determined, as alleged in said paragraph, that the contract of July 1, 1925 between the defendant and the Pacific Gas and Electric Company was in violation of the provisions of Section 6 of the Raker Act, was by him put upon various and sundry grounds, and this defendant alleges upon information and belief that the grounds of the said decision of the said Secretary was and each of them

was invalid, and this defendant asks that the same be so adjudged by this Court. [21]

VII.

Answering the allegations of Paragraph X of said complaint, defendant admits that in the future it will continue to sell electric energy generated on the Hetch Hetchy project in conformity with the terms of said Raker Act, and avers that under said Raker Act, and particularly the provisions of Sections 9 (m), 9 (n), and 9 (o) of said Act, it is made mandatory that electricity be generated by defendant and utilized or sold. Defendant denies that any grounds exist for the issuance of a restraining order by this Honorable Court to prevent such sale.

VIII.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XI and basing its answer on that ground, denies each and every allegation thereof.

IX.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XII and basing its answer on that ground, denies each and every allegation thereof.

X.

Answering the allegations of Paragraph XIII of plaintiff's complaint, defendant denies that the electric power alleged to be sold by defendant in viola-

tion of the terms and conditions of said Act, or otherwise, is of an annual value in excess of $8,000,000, or that at any time while said power was being delivered to said Pacific Gas and Electric Company, that the annual value of the same was in excess of $2,200,000, at the terminus of defendant's transmission line at Newark, California, or that the same is being sold by defendant to the Pacific Gas and Electric Company or any other corporation for a sum not in excess of $2,200,000 annually, or at all, and alleges that said power is being distributed by said Pacific Gas and Electric Company as the agent of said defendant and that said defendant realizes approximately $2,200,000 annually from said distribution.

XI.

Answering the allegations of Paragraph XIV of plain- [22] tiff's complaint, this defendant denies that the remaining unappropriated water resources appurtenant to the public domain of the United States, or any water resources whatever situate in the Yosemite National Park or Stanislaus National Forest, have been reserved or set aside to be conserved or administered by the United States for the public benefit of its people, or that said water resources are subject to reservation, under the Constitution or laws of the United States, by said United States for any purpose whatever, and that the sole reservations made by the United States heretofore have been of certain public lands in said Yosemite National Park and Stanislaus National

forest; that said reservations extend only to said lands and not to water resources, and that the sole and exclusive power to dispose of the water resources originating on said public lands and flowing in the streams of the State of California is vested in the State of California as a sovereign state.

XII.

Answering Paragraph XV of plaintiff's complaint, this defendant admits the allegation that it was the intent and purpose of the Raker Act that the United States through the Secretary of the Interior might be enabled to safeguard public interest in the rights, easements and lands thereby granted to defendant, but denies that such safeguarding or said Act involved or contemplated carrying into effect any such governmental policy as is set forth in plaintiff's complaint.

XIII.

Answering Paragraph XVI of plaintiff's complaint, defendant admits that such rights, easements, lands, and privileges as were granted by said Raker Act to the defendant [23] were granted to it for utilization and development for the use of its people, but denies that the electric power developed by defendant is being used by defendant for the benefit of the Pacific Gas and Electric Company, a private corporation, contrary to the terms and conditions of said Act, or in derogation of the governmental policy therein recognized, or otherwise.

XIV.

Answering Paragraph XVII of plaintiff's complaint, defendant denies that plaintiff has been defrauded and damaged, or defrauded or damaged, or that defendant continues to defraud or damage plaintiff by its alleged wrongful enjoyment, use or occupation of plaintiff's rights, or any right of plaintiff whatever.

XV.

Answering Paragraph XVIII of plaintiff's complaint, defendant denies all and singular the allegations therein contained.

XVI.

Answering Paragraph XIX of plaintiff's complaint, defendant denies all and singular the allegations therein contained.

XVII.

Answering the allegations of Paragraph XX of plaintiff's complaint, defendant denies that plaintiff is without an adequate remedy at law, or that the intervention of equity is necessary in any way for the protection of plaintiff's rights. [24]

Second Defense

For a second and separate defense to plaintiff's complaint herein, defendant alleges as follows:

I.

That the plaintiff in the ownership and disposal of the public lands of the United States acts in a

purely proprietary capacity and not in a governmental capacity, and as such proprietor is subject to all the privileges, rights, and disabilities of a private owner of property except that, being also a sovereign proprietor, its lands are not subject to taxation, nor are the acts of its officers in administering said lands subject to regulation by state laws.

II.

That by reason of its geographical location and situation, the defendant in this action was confronted in the early part of this century with the necessity of providing an additional water supply for its inhabitants, its industries, its commerce, and its municipal needs; that no adequate supplies were available in the vicinity of San Francisco Bay and, acting under the advice of competent engineering experts, defendant selected a source of water supply on the head waters of the Tuolumne River and its tributaries in Tuolumne County, in the State of California. A portion of the head waters of said river flows through lands comprised within the boundaries of the Yosemite National Park, and another portion flows through lands comprised within the boundaries of the Stanislaus National Forest. A portion of the lands lying within the two principal reservoir sites selected for said project, namely, Hetch Hetchy Valley and Lake Eleanor Basin, was at that time owned and held in private ownership in fee under patent theretofore [25] issued by the United States. Another portion of

said reservoir sites consisted of public lands, title to which was still in the plaintiff. It was also necessary in order to construct defendant's proposed water supply project that access to said reservoir sites should be had by aqueducts, canals, ditches, pipe lines, flumes, tunnels, roads, trails, electric transmission lines, and telephone and telegraph lines, so that materials might be brought on to said sites and the necessary storage dams and tunnels might be constructed thereon and therein and thereafter might be operated. Defendant first appealed to the Secretary of the Interior of the United States of America for permits to utilize such lands and rights of way for such construction purposes. In response to said application, a permit was granted to defendant by the Honorable James R. Garfield, Secretary of the Interior, in 1908, but later and in the year 1911, and after defendant had expended over $600,000 in the purchase of privately owned lands in said reservoir sites and in preliminary surveys and construction work, connected with said project, the Honorable R. A. Ballinger, then Secretary of the Interior, issued an order to show cause why this permit should not be revoked as to the Hetch Hetchy Valley in the Yosemite National Park, and suggested that the matter was one on which Congress should be requested to act. Accordingly, in 1913, defendant caused a bill to be introduced in Congress, known as the Raker Bill, authorizing the grant to defendant of the lands and rights of way sought. This bill, with numerous

amendments added by Congress, became a law on December 19, 1913, and is the Act referred to in plaintiff's complaint.

III.

Due to the fact that the lands and rights of way [26] acquired by the defendant from the plaintiff and from private owners were situated at an elevation of more than 3,000 feet above sea level, it was apparent at the outset that the gravity fall in the aqueduct line extending from said lands to San Francisco could be utilized for the generation of hydroelectric energy, and Congress in framing said Raker Act expressly provided and made it mandatory that the defendant should generate the electric energy made possible by dropping defendant's water through said difference in elevation, and required that defendant should distribute, transmit, and use or offer for sale the electric energy of not less than 60,000 horsepower which could be generated in connection with said project. The rates or charges to be made by the grantee for such power were required by said Raker Act at all times to conform to the laws of the State of California and only in the absence of any such statutory provision were they to be subject to the approval of the Secretary of the Interior; that at all times since the enactment of said Raker Act the Constitution and laws of the State of California have vested their power and authority in the defendant to fix the rates and charges for such electric energy as it might generate, and have vested exclusive authority

in the Railroad Commission of said State to pass on and approve any contracts that might be made with defendant for the transmittal or distribution of said electric energy by any privately owned public utility. Said Raker Act also imposed upon said defendant numerous conditions with respect to building roads and trails and turning the same over to the plaintiff, and to pay plaintiff annual rentals for the rights conferred by said Act varying from $15,000 to $30,000 annually. Defendant was further required under the provisions of said Act to sell electric energy to irrigation districts or municipalities for municipal public uses, [27] after which the defendant was expressly authorized by the provisions of the Act to dispose of any excess electrical energy for commercial purposes.

IV.

Following the enactment of said Raker Act in 1913, this defendant proceeded to file and obtain the approval of the Secretary of the Interior of certain maps required thereunder, and did enter into possession of the lands, rights and easements thereby granted and did construct said Hetch Hetchy project. In reliance upon the validity of said grant of rights and easements the defendant expended not less than $89,600,000 in the construction of said Hetch Hetchy project, exclusive of interest during time of construction, in addition to acquiring its local water supply distribution system from the Spring Valley Water Company at an ad-

ditional cost of $40,000,000, all of which cost was paid, or the obligation to meet the same was assumed, by defendant and its taxpayers and no part of which was paid by plaintiff. The first delivery of water from said project was made to defendant in San Francisco in the year 1934. Due to the fact that the total water supply available through the full utilization of said lands, rights, and structures involved in said project is to be delivered in installments, as required by the growing population and needs of the San Francisco bay cities, designated as the grantee under said Raker Act, it is probable that more than 100 years will elapse before said water supply is fully utilized, and many millions of dollars will still have to be expended by the defendant before such full utilization can take place. The plaintiff, however, will not be deprived of the utilization of any lands or rights of way beyond those already granted to defendant when such full utilization takes place. [28]

V.

Approximately the total acreage of lands contributed by the plaintiff to the construction of said project in the form of reservoir sites was and is Two Thousand Five Hundred and Eighty, (2580) acres, having a fair market value as of the date of acquisition of One Hundred and Twenty-Nine Thousand Dollars ($129,000). The total acreage of patented lands acquired by defendant located in said reservoir sites and necessary for use in connection with said reservoirs was One Thousand Five

Hundred and Forty-Eight (1548) acres, for which defendant paid the sum of Four Hundred and Eleven Thousand Two Hundred and Thirty Dollars, ($411,230). The total mileage of tunnel aqueduct rights of way granted by plaintiff to defendant under the terms of said Act was Forty-Five miles (45), having a fair market value as of the date of said grant of not more than Two Thousand Seven Hundred and Twenty-Two Dollars ($2722.00); the total mileage of aqueduct right of way purchased by defendant for use in the construction of said project was Eighty (80) miles, which actually cost said defendant One Million One Hundred and Fourteen Thousand Eight Hundred and Ninety-Nine Dollars ($1,114,899). The total value of the roads, trails and temporary rights for construction of railroads granted by plaintiff to defendant as of the date of such grant did not exceed the sum of Three Thousand Four Hundred and Fifty Dollars, ($3,450). That all of said roads, trails and camp sites upon completion of their use were surrendered to plaintiff by defendant and are available for the use of the public, subject to the conditions provided in the Raker Act; that in addition thereto and in further compliance with the terms of said Raker Act, defendant has expended over One Million Seven Hundred and Sixty-One Thousand Dollars ($1,761,000.) in constructing roads and trails upon plaintiff's lands required by the express provisions of said Act and by the Secretary of the Interior in administration [29] thereof for the use of plaintiff

and of the public. That in compliance with the terms of Section 7 of said Raker Act, the defendant has paid to the plaintiff Three Hundred and Thirty Thousand Dollars ($330,000) prior to the commencement of this action, and plaintiff has accepted said sum as total annual rentals for the privilege granted under the terms of said Act; that the construction of said Hetch Hetchy project to the extent that it has now been completed has extended over a period of more than twenty (20) years and including the water distribution system has cost defendant and its taxpayers to date, approximately the total sum of One Hundred Sixty-Seven Million Dollars ($167,000,000).

VI.

That in or about the year 1925 defendant had completed the Hetch Hetchy storage dam, the low dam at Lake Eleanor, the Mountain Division of the tunnel aqueduct, the Priest forebay, the Moccasin Creek power plant, and a power transmission line extending from said Moccasin power plant to the vicinity of Newark in Alameda County, California. Said moccasin power plant and the forebay and penstock line appurtenant thereto, were constructed entirely on lands owned in fee simple by the defendant and purchased by defendant from private owners. It had at that time practically reached the lawful bonding capacity authorized under its Charter and the Constitution of the State of California. It was highly desirable from an economic point of view and in conformity with the require-

ments of said Raker Act that the hydroelectric energy which could be generated at asid Moccasin power plant should be utilized and sold and the revenues therefrom used by defendant in amelioration of the financial burdens incident to the construction of said project. At that time defendant did not own and has never since acquired any retail distribution system adequate for the disposal of the 80,000 horsepower of electric [30] energy which could be generated at said Moccasin power plant or any distribution system whatever. At that time, although defendant had made formal offers to the Modesto and Turlock Irrigation Districts and municipalities situated therein to sell them hydroelectric power, as provided in the terms of said Raker Act, both of said Districts, and all of said municipalities, had declined to purchase the same. At that time the defendant had decided definitely to pierce the Coast Range Mountains with a low level aqueduct tunnel and not to utilize the electric energy generated at Moccasin power plant to pump the water supply over the Coast Range, a plan which had been in serious contemplation at the time the Raker Act was passed and was not abandoned until some years later. Thus, in the year 1925 defendant found itself with facilities for the generation and transmittal to the Town of Newark in Alameda County of eighty thousand (80,000) kilowatts of hydroelectric energy and no means of transmitting, distributing or selling the same beyond that point.

VII.

In the year 1925 the Pacific Gas and Electric Company, a public utility corporation, and the Great Western Power Company, another public utility corporation, exclusively owned all of the facilities for distributing hydroelectric energy in the City and County of San Francisco, and owned transmission lines extending from Newark to San Francisco, capable of transmitting such 80,000 kilowatts of electric energy and distributing the same to said City and County of San Francisco, its inhabitants, its industries, and its commercial users. Said public utility corporations also owned electric generating stations situate within the city limits of San Francisco and propelled by steam power capable of furnishing an adequate standby service to take care of the peak loads and occasional [31] interruptions of transmission line deliveries of hydroelectric energy to said City and County and the consumers of electricity therein. Shortly after said date said Pacific Gas and Electric Company purchased the assets of said Great Western Power Company and became the sole owner of all of said transmission and distribution facilities. In 1925 the power consumption load in the City and County of San Francisco was such, and the load factor of said load was such, that at times during each year the total energy which could be generated at said Moccasin power house would have been inadequate to supply the needs of the population of the City of San Francisco, and any safe delivery of electric

energy then required and still requires that a steam standby generating plant be made available to take up immediately the generation of electric energy if accident should happen to interrupt hydroelectric transmission, otherwise said City and County and its inhabitants would be left without electric lights or power, with very serious consequences to the lives, welfare and safety of its inhabitants.

VIII.

With all of the above factors in mind affecting the situation, the responsible authorities of the defendant City and County of San Francisco opened negotiations in the year 1925 with both of said public utility corporations, with a view to arranging some method by which this hydroelectric energy could be utilized and its reasonable value obtained by said City and County of San Francisco instead of being wasted, in violation of the express terms of said Raker Act, with consequent loss to defendant. The defendant first inquired of said public utility corporations whether they or either of them [32] would be willing to sell to defendant their transmission and distribution systems on a pay-as-you-go plan which would permit defendant to amortize the cost thereof within a period permitted by its bonded debt limitations. Each of said public utility corporations informed defendant that under no circumstances would they either sell or lease their distribution systems to the defendant for operation by defendant, upon any terms or con-

ditions whatever. The defendant's responsible authorities, having in mind an agency arrangement, the form of which had been approved by the Solicitor of the Department of the Interior in the year 1917, as then applied to the Early Intake construction power plant on the Hetch-Hetchy project, inquired of said public utility corporations whether they or either of them would be willing to enter into an agency agreement whereby such corporation would transmit and distribute such energy as agent for the defendant and for its account and benefit. The said Great Western Power Company was not interested in such an agreement, but said Pacific Gas and Electric Company consented to enter into such an arrangement. Thereupon a contract was duly prepared, executed and entered into by the defendant and said Pacific Gas and Electric Company carrying such arrangement into effect. A true, full and correct copy of such agency contract is marked Exhibit "A", attached to this answer, made a part hereof, and especially referred to for all particulars thereby shown.

IX.

Upon the execution of said contract the defendant through its Mayor and other representatives, took the same to Washington, D. C. and personally presented the same to the Honorable Hubert Work, who was then Secretary of the Interior, asking his approval of the same. Said Secretary of the Interior referred the question to the Honorable John

[33] G. Sargent, who was then Attorney General of the United States, with a request for his opinion. The said Attorney General advised the Secretary of the Interior, and the Secretary of the Interior advised defendant's representatives that there were no provisions or requirements in said Raker Act for the express approval of operating contracts made by defendant and declined to express any opinion with respect to the same. Defendant then advised the Secretary through its responsible officers that they intended to put said contract in effect and did so. Since said date said contract has been successively reviewed by Honorable Ray Lyman Wilbur and the Honorable Harold L. Ickes, both of whom were Secretaries of the Interior in the succession named; but up and until the review by Secretary of the Interior Harold L. Ickes, none of said Secretaries expressed disapproval of said agency agreement, but on the other hand permitted defendant and the Pacific Gas and Electric Company to continue the same in effect and to arrange construction programs based on the assumption that said agreement would remain available as the main source of supply of electric energy to the City and County of San Francisco and its inhabitants.

X.

In and by the provisions of defendant's municipal Charter defendant is committed to the gradual acquisition and ultimate ownership of all of its public utilities, and from time to time during the years

following 1925 said defendant submitted to its electors the question of acquiring or constructing a transmission line from Newark to San Francisco, a step-down and standby plant in San Francisco, and a distribution system for the delivery of such hydroelectric energy to its inhabitants; but on each and every occasion of said submission [34] of said proposal to said electors, said electors refused and declined to approve the same or authorize such acquisition and construction or to vote bonds necessary to finance the same. Defendant therefore was left wholly without any other means of transmitting and distributing said electric energy than those afforded by the agency agreement with the Pacific Gas and Electric Company. That the cost of a system to distribute the hydroelectric power generated by defendant on the said Hetch Hetchy project will be in excess of $50,000,000. That prior to the completion of the said hydroelectric plant at Moccasin Creek the defendant, under and pursuant and by virtue of the laws of the State of California, instituted proceedings before the Railroad Commission of the State of California, for the purpose of evaluating the distribution systems of the Pacific Gas and Electric Company and the Great Western Power Company, which said companies owned the systems in the City and County of San Francisco for the distribution of electric power, said proceedings having been instituted during the month of November, 1924, and though diligently prosecuted by said defendant, were not completed until 1931,

and that the said defendant in prosecuting said proceedings expended the sum of $392,000.

XI.

Defendant avers that all and singular the provisions of said contract, Exhibit "A", constitute a reasonable compliance with the provisions of said Raker Act and in particular with the provisions of Section 6 thereof upon which plaintiff principally relies; that said contract is not a contract to sell said energy for re-sale purposes; that said contract merely employs the Pacific Gas and Electric Company to use its transmission, standby and distribution facilities for the transmission of such hydroelectric energy to the consumers thereof, [35] to collect the rates fixed by the Railroad Commission of the State of California pursuant to the laws of said State for such distribution, and to account to the defendant for the proceeds of such operation after deducting a reasonable charge for such service and the use of said corporation's facilities. That by reason of said facts, and by reason of all the facts alleged and set forth in this separate answer to plaintiff's complaint, defendant avers that plaintiff's complaint is without equity; that said facts show that defendant's operations have not been a detriment but have been of great financial benefit to the plaintiff, and that the destruction of defendant's revenues from hydroelectric energy due to any abrogation of said agency agreement would cause a great and irreparable injury to defendant and

its taxpayers and electric energy consumers, all without any benefit whatever to the plaintiff; that under such circumstances a Court of Equity should not intervene.

Third Defense

For a third, separate and further defense to plaintiff's complaint herein, defendant alleges:

I.

Defendant herein incorporates by reference all of the allegations of its second and separate defense in this answer as fully as though herein set forth in particular.

II.

Defendant alleges that the plaintiff and its officers, the Secretary of the Interior and the Attorney General of the United States, are estopped through the previous acquiescence of their predecessors in office in the acts and proceedings of defendant with respect to said electric energy disposal, and by reason of plaintiff's receipt and acceptance of all of the [36] payments and financial benefits accruing to it under the terms of said Raker Act and its operations thereunder from now complaining of and attempting to enjoin the continuance of said agency agreement in the manner and to the extent that it has heretofore been carried out; alleges that the plaintiff, as the proprietor of public lands, is bound by the same rules of estoppel, and its agents and officers are bound by the same rules of estoppel as would govern a private individual under like

circumstances; and that plaintiff, having accepted said benefit accruing to it from the construction of said project and without offering to surrender to defendant any portion thereof, is estopped and its said Secretary of the Interior and Attorney General are estopped from depriving defendant of the enjoyment of the benefits therefrom accruing to defendant as hereinbefore alleged, and the defendant furthermore alleges that the plaintiff and its officers the Secretary of the Interior, and the Attorney General, by their action and acquiescence, as in this paragraph hereinbefore alleged and in Paragraph IV of this defense, in the existence, enforcement and enjoyment by the defendant of its contract with the Pacific Gas and Electric Company, joined with it in putting a contemporaneous construction upon the said contract and the said Raker Act to the effect that the former did not violate the latter.

III.

Defendant further alleges that its policy of distributing surplus hydroelectric energy through an agency agreement with a private corporation is entirely in accord with the public policy of the plaintiff as expressed in its distribution of hydroelectric energy generated at plaintiff's plant in Yosemite Valley, in connection with the Boulder Dam project in Southern Nevada, and in conjunction with all or practically all other [37] reclamation and water storage projects which have been undertaken by the plaintiff in recent years; that by reason of these facts the defendant had a right to rely upon an in-

terpretation of said Raker Act entirely in conformity with the accepted public practice of the plaintiff, and plaintiff is estopped in this instance from any right to complain of or enjoin defendant from placing such interpretation upon its obligations with respect to the Hetch Hetchy project.

IV.

That ever since defendant's power plant at Moccasin Creek was completed and placed in operation defendant has been using all of its appropriated waters in the Tuolumne River and its tributaries for the purpose of generating hydroelectric power at said plant, and that when said water is so used, all of it, with the exception of the amount which defendant brings to the City and County of San Francisco for domestic and commercial uses of its inhabitants and inhabitants of contiguous territory, is permitted to flow into the Dom Pedro Reservoir owned by the Turlock Irrigation District and the Modesto Irrigation District, and that said districts use said water for the production of hydroelectric power and do now sell the same and ever since the completion of said Moccasin Power Plant have sold the same to various individuals and corporations for re-sale, and although these facts were well known to plaintiff, that plaintiff has not protested against the sale of said power by said irrigation districts or taken any action to prevent the same, and the effort and endeavor of plaintiff to prevent defendant from using the same water in the same way is an unfair

and unjust discrimination against defendant, and the defendant furthermore alleges that the plaintiff and its officers, the Secretary of the Interior, and the Attorney General, by their action and acquiescence, as in this [38] paragraph hereinbefore alleged and in Paragraph II of this defense, in the existence, enforcement and enjoyment by the defendant of its contract with the Pacific Gas and Electric Company, joined with it in putting a contemporaneous construction upon the said contract and the said Raker Act to the effect that the former did not violate the latter.

Fourth Defense.

For a fourth, separate and further defense to plaintiff's complaint herein, defendant alleges:

I.

Defendant herein incorporates by reference all of the allegations of its first, second and third defenses in this answer as fully as though herein set forth in particular.

II.

That by reason of the fact that all and singular the waters used by defendant in the generation of electric power of the Hetch Hetchy project were acquired by defendant and are owned by defendant under and pursuant to the laws of the State of California, the Congress of the United States had not the power or authority to limit the use of said waters by said defendant or to impose on said de-

fendant any condition under which said waters might be used. [39]

Fifth Defense

For a fifth, separate and further defense to plaintiff's complaint herein, defendant alleges that:

I.

Defendant herein incorporates by reference all of the allegations of its first, second, third and fourth defenses in this Answer as fully as though herein set forth in particular.

II.

A controversy has arisen and exists between the plaintiff and the defendant in respect of matters shown to be in issue by the pleadings and otherwise not so appearing; and to the end that all of the questions in dispute may be set at rest in this action, the defendant alleges that it is proper to and asks that it may be adjudged (a) that the plaintiff has not and has not had since they were first appropriated by the defendant, any proprietary right, title or interest in or to any of the waters referred to in the complaint or in this action, and has no right, title or interest in or claim upon or in respect of the moneys realized by the defendant from or through said waters; (b) that the plaintiff has no proprietary right, title or interest in or to the electric energy generated by the defendant by or through the use of the water aforesaid, and has no right, title or interest in or claim upon or in re-

spect of the moneys realized by the defendant from or through said electric energy generated by the defendant; (c) that under the Raker Act the plaintiff has no right of forfeiture in respect of any of the water appropriated and diverted by the defendant or energy generated by it, and no right of accounting in respect thereto, but that it is limited for remedies of any breach of obligation imposed upon the defendant by Congress and accepted by it, as provided in the Raker Act, particularly Section 9, subsection (u) reading as follows: [40]

"Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

(u) "* * * That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

(d) That the divers and sundry questions other than the foregoing which appear by the pleadings or shall later appear in the proofs be determined in accordance with right and justice.

III.

In support of the proposition that Section 9, subsection u of the Raker Act limits the remedies of the plaintiff as in said section and subsection defined, defendant alleges that the following is the history of said Section 9, subsection u: [41]

The Raker Act (38 Stat. at L. pp. 242-251) is officially entitled:

> "Chap. 4—An Act Granting to the city and county of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes." (63rd Congress, 2d Session)

The Raker Act was passed by the House September 3, 1913 (63rd Congress, 1st session); by the Senate December 3, 1913 (63rd Congress, 2d session); and became a law by approval of the President, December 19, 1913.

The language of Section 9, subdivision (u) of the act dealing with remedies for a breach of the provisions of the act by the city and county of San Francisco is as follows:

> "Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:
>
> . . . . . .

(u) . . . That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

The language quoted in subdivision (u) of Section 9 was added to the bill in Committee of the Whole of the House on September 2, 1913.

The language is plain and unambiguous and it was meant to express the exact idea contained in it as clearly appears by the following history of the legislative proceeding in which it originated. [42]

On Tuesday, September 2, 1913, the House of Representatives resolved itself into a Committee of the Whole for consideration of the Raker bill. The proceedings before the Committee appear in Volume 50 of the Congressional Record commencing on page 4090, foot column 2, and ending on page 4112, middle c. 2.

At page 4101, foot c. 2, the clerk read section 9 of the bill quoted from above, whereupon the following occurred.

Mr. Murray of Oklahoma moved to add to the end of the first paragraph of section 9 above quoted,

just after the word "enumerated" the following new matter:

> "And upon the violation of the grantee of any of said conditions, all the title, easements, and franchises, together with all appurtenances thereunto belonging granted by this act, shall revert to the United States." (p. 4103, top c. 2)

Mr. Mann:

> "To say that San Francisco, after it has expended $75,000,000. or $100,000,000. forfeits its entire right . . . seems to me to be going the limit. If it is the intention for Congress to reserve complete control over this and not give an absolute fixed right upon which the city may borrow money, the best way to do it, it seems to me, would be to insert the ordinary provision that Congress reserves the right to alter, amend, or repeal. Then if they violated the provisions of the act so that there is substantial violation, it is within the control of Congress." (p. 4103, middle c. 2.)

Mr. Kent (of California):

> "Mr. Chairman, it seems to me that this amendment, which means well, is altogether too severe. . . . I think that all public rights are properly safeguarded in the bill as it now stands." (p. 4103, bottom c. 2.)

After considerable discussion Mr. Murray's amendment which provided for a forfeiture was rejected by an overwhelming vote.

The following then occurred:

Mr. Ferris:

"Mr. Chairman, I think there is scarcely any difference in the views of the members of the [43] committee about the amendment offered by my colleague from Oklahoma (Mr. Murray). Some of us thought his amendment was too drastic, some thought there should be no amendment at all. I think the gentleman from California (Mr. Raker) has an amendment which will accomplish all that the gentleman from Oklahoma seeks to accomplish, and will at the same time not render the bill nugatory in any way." (p. 4105, foot c. 2)

Mr. Raker then offered an amendment, later adopted, whereby the above quoted matter of Section 9 was incorporated in the bill. (p. 4106, top c. 1).

Immediately the following occurred:

Mr. Murray (of Oklahoma):

"Mr. Chairman, that amendment is satisfactory to me." (p. 4106, top c. 1)

Mr. Raker:

"The provision just offered . . . makes it the duty of the Attorney General of the United States, upon written request of the Secretary of the Interior, to commence suit in the proper court to enforce all of these conditions and contracts between the city and county of San

Francisco and the United States, so there can be no question but that every provision not attempted to be complied with can be enforced by the United States against the city and county of San Francisco." (p. 4106, middle c. 1)

Mr. Steenerson (of Minnesota):

"Mr. Chairman, . . . If this amendment were not inserted and there were a breach in the conditions of the grant, by force of the common-law procedure and practice the Attorney General could bring a suit for forfeiture for violation of those conditions. But this amendment limits the right of the Attorney General to bring a suit not of forfeiture . . . but a suit to enforce the provisions of the grant." (p. 4106, foot c. 1)

Mr. Raker's amendment was then agreed to (p. 4106, top c. 2). Later on the same day the Committee reported the bill to the House, where the amendment was agreed to. The act was passed by the House on the next day, September 3, 1913. [44]

Wherefore, defendant prays that plaintiff take nothing by its action; that the Court hold and adjudge that said agency agreement, Exhibit "A", is a valid, existing contract between the defendant and the Pacific Gas and Electric Company and not in violation of any of the terms and provisions of said

Raker Act, and that defendant be hence dismissed with judgment for costs of suit.

JNO. J. O'TOOLE
City Attorney
DION R. HOLM
Assistant City Attorney
Attorneys for defendant, City and County of San Francisco.

[45]

State of California,
City and County of San Francisco—ss.

John J. O'Toole, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting City Attorney of the City and County of San Francisco; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

JNO. J. O'TOOLE.

Subscribed and sworn to before me this 19th day of July, 1937.

EUGENE F. LACY
Deputy County Clerk and ex-officio
Deputy Clerk of the Superior Court. [46]

EXHIBIT "A"

This Agreement, made and entered into this..... day of....., 1925, by and between the Board

of Public Works of the City and County of San Francisco, acting for and on behalf of the City and County of San Francisco, a municipal corporation, hereinafter referred to as "City", under authority of the Board of Supervisors granted by Ordinance No..... (New Series), the party of the first part, and Pacific Gas and Electric Company, a corporation, of San Francisco, California, hereinafter referred to as "Company," the party of the second part;

Witnesseth:

Whereas, the City has now completed the construction of the Moccasin power plant as a part of the development of the Hetch Hetchy project, which plant has a rated capacity of 70,000 kilowatts and is capable of producing approximately 460,000,000 kilowatt hours of electric energy annually, and has also completed the building of a transmission line to the vicinity of Newark in Alameda County of sufficient capacity to transmit and deliver to that point approximately 420,000,000 kilowatt hours after allowance for transmission losses; and,

Whereas, The City has not yet constructed or acquired a transmission line from the point near Newark to the City limits, and has not yet constructed or acquired a distribution system for utilizing the power produced at Moccasin plant and delivering the same for general municipal uses and for sale to consumers of electric energy within the limits of the City and County; and,

Whereas, Pursuant to resolutions of its Board of Supervisors looking to the acquisition of a municipally owned, elec- [47] tric distribution system, the City has commenced and there is now pending before the Railroad Commission of the State of California, proceedings for the determination by the Commission of the compensation to be paid by the City for the local distribution systems and certain steam plants now owned and operated by the Pacific Gas and Electric Company and the Great Western Power Company of California, respectively, when the same shall be taken over by the City under eminent domain proceedings, or otherwise;

Whereas, The City has not funds available at the present time with which to purchase or construct a distribution system of its own and it will be necessary to submit a proposition to the People to vote bonds to provide money for that purpose before a distribution system can be purchased or constructed, and the City cannot well determine whether to purchase one or both of the local distribution systems, or to construct a distribution system of its own until the Railroad Commission determines the amount of compensation to be paid by the City for the taking of either or both of said local distribution systems under the proceedings now pending before the Commission; and

Whereas, The City intends to complete its power transmission line from Newark to San Francisco

and to acquire or construct a distribution system of its own; and

Whereas, The said Moccasin Power Plant is now in condition to operate at its full capacity of 70,000 kilowatts and unless some temporary arrangement is made between the City and the Company for the distribution to consumers of the electric energy which can be produced at said plant during the period that must elapse before the City can acquire, own and operate a distribution system of its own, there will be a great waste of said potential energy and a great loss of potential revenue to the City and its taxpayers; and, [48]

Whereas, The statistical and financial records kept by the City or the Company show the following, viz.:

1. That the total capacity and possible annual output of energy from the Moccasin plant will not be sufficient to supply all municipal requirements and the demand of consumers in the City and County for electric power and energy, although in hours and days of low energy requirement the capacity and output may be more than sufficient to supply said requirements and demands during said hours and days.

2. That the average transmission and distribution losses of energy from the Newark substation of the Company to the various consumers' motors in San Francisco is 24 per cent of all energy delivered into the system of the Company at Newark for

transmission and distribution to consumers in San Francisco.

3. That 2.383 cents is the average revenue per kilowatt hour received from all classes of consumers of the Company in San Francisco under existing rates based on the experience of the Company for the year 1924.

Now, Therefore, in consideration of the premises and the mutual covenants and conditions herein contained, the parties hereto mutually covenant and agree as follows:

First: The City hereby employs the Company and the Company accepts employment as temporary distributor for and on behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines. The City agrees to so maintain its Moccasin plant that it will, whenever necessary to do so, carry load up to its full capacity of 70,000 kilowatts, subject to limitations of its forebay storage and to accidents and unforeseen contingencies; and to deliver and consign the entire energy output of its said plant to the Company, save and except such [49] portion thereof as may be reserved for City requirements as hereinafter provided. The Company agrees to accept such consignment of the entire energy output of Moccasin plant, less transmission losses and except such portion as the City shall retain as above and hereinafter mentioned, delivered at not to exceed a 75 per cent monthly load factor, to make at its own ex-

pense the necessary physical connection of the City's transmission lines with its own system at Newark; to install all necessary equipment, facilities and proper motors for accurately measuring the amount of energy delivered; to transmit so much of said energy through its own system to San Francisco as may be required to light public streets and to meet other municipal needs for electric energy; to supply street railroads and other consumers of such energy in the City; to transform, convert, regulate, distribute and meter the energy sold; to furnish all necessary peak load and steam standby service and collect from consumers of such energy the charges therefor which shall not exceed the lawfully established rates, and make accounting to the City as hereinafter in Paragraph Fifth provided.

Second: The City agrees that the energy consigned to the company from the Moccasin Plant shall be the entire output thereof, diminished only by transmission and other losses and by such amounts as the City shall require for its own use in the construction or operation of any portion of the Hetch Hetchy Project, and also by such amounts, if any, as the City may be legally required to furnish to irrigation districts or municipalities under the term of the act of Congress, approved December 19, 1913, known as the Raker Act. Failure or inability of the Company to take at Newark a part of the energy which the City is in a position to deliver to it under the terms of this agreement

shall not constitute grounds for deduction in the [50] amount of the revenue to be paid to the City had such energy been received by the Company and sold to consumers, it being understood, however, that the Company is not required to accept the output of the Moccasin plant at a monthly load factor in excess of 75 per cent.

Third: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that of the energy consigned and delivered to the Company at Newark and by the Company delivered to consumers in the City and County of San Francisco there would be transmission, substation and distribution losses amounting to 24 per cent of the energy thus consigned and delivered at Newark and therefore 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers.

Fourth: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that in-

asmuch as in the year 1924 under existing rates the average revenue received by the Company from consumers in San Francisco amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy to be consigned and delivered by the City to the Company at Newark for the purposes in this contract declared.

Fifth: In order to arrive at the amount which should [51] be realized by it for its Moccasin energy consigned and delivered by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that the City shall receive for the energy consigned and delivered by it to the Company at Newark 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof.

It is agreed by the City and the Company that the Company shall account for and pay over to the City for the energy so consigned and delivered to it by the City at Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered by the City to it at Newark, and the Company shall retain the aforementioned 73.065 per cent as its compensation for services rendered under this contract.

Sixth: The City shall not be obliged to deliver energy into the system of the Company at Newark,

nor shall the Company be obligated to receive such energy at such time as either shall be prevented from doing so on account of accidents, acts of God or fire, making it physically impossible to so deliver or receive energy or on account of strikes, riots, war, or any other cause beyond reasonable power of control of either party. In the event of inability on the part of the City to deliver the said energy at Newark, or inability on the part of the Company to receive the energy at Newark arising from any of the causes in this paragraph specified, the party so prevented from making such delivery of energy or receiving such energy shall proceed at all possible speed to take the necessary action to enable it to comply with [52] its covenants herein contained.

Seventh: The net proceeds due the City, namely 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark by it to the Company, shall be paid into the Treasury of the City and County of San Francisco by the Company in monthly installments and not later than the 15th day of each month after operation under this agreement commences. The amount of such payment shall be based upon the amount of energy actually delivered into the system of the Company at Newark during the preceding month. In the event of the refusal, failure or inability of the Company to take the available output of the Moccasin plant deliverable at Newark in accordance with the terms of this agreement, then the

amount of energy which the City could have delivered shall be the basis of computing such monthly payment. The method for determining this amount shall be covered in the memorandum of technical specifications, details and conditions hereinafter provided for.

Eighth: Should the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority, then the amount to be retained by the Company and the amount to be paid to the City under the terms of this agreement shall be proportionately increased or decreased.

Ninth: Neither this contract nor anything contained herein, nor the prices, rates or charges fixed herein shall ever be offered or in any manner used as evidence by either said City and County or said Company or any successor in interest of either of them in any court or before any commission or official of the State of California or of the United States of America in any action or proceeding in which said City or any successor in interest shall be a party adversary to said Company, or any successor in interest, other than an action or proceeding between [53] the parties hereto, or their respective successors in interest, or one of said parties and a successor in interest of the other, commenced and prosecuted for the purpose of obtaining a judicial or official interpretation or determination of the legality of this contract or of any provision thereof or for the purpose of enforcing its per-

formance, or recovering damages for its non-performance.

Tenth: It is expressly recognized that this contract is a temporary arrangement between the parties for distributing the energy output of the Moccasin plant over and through the Company's lines and system during the period that must elapse before the City can construct or acquire a distribution system of its own.

It is therefore agreed that the contract may be terminated at any time by either the City or the Company upon one day's previous notice in writing to the other.

Eleventh: It is further understood and agreed that this contract is subject to immediate cancellation upon request or demand of the Secretary of the Interior of the United States should he hold that in his opinion the agreement violates any provision of the laws of the United States in general, or the Raker Act in particular.

Twelfth: All of the electric energy to be delivered and received pursuant to the provisions of this contract shall be three phase, 60 cycle, alternating current. The electromotive force of such energy at the point of delivery shall be approximately 105,000 volts, slight variation in voltage and frequency to be permitted.

Thirteenth: The Company shall inspect, test and keep in proper repair all meters and accessories at Newark which will be used for measuring the amount of electric energy consigned to

the Company under this contract. The said meters shall be [54] kept under joint seals of the City and Company which shall not be broken except in the presence of authorized representatives of both parties. Either party shall have the right at any time to request an inspection or test, and if found necessary, proper adjustment of such meters in the presence of a representative of the other party appointed for that purpose. When such inspection or test is desired, sufficient notice shall be given by the party desiring the test, to permit of the other party having its representative present. The registration of the meters shall be used as the basis of determining the amount of energy consigned hereunder, unless, upon being tested, the meters shall be found to register inaccurately and such inaccuracy shall exceed two per cent (2%). Where the inaccuracy is more than two per cent (2%), but the actual inaccuracy can be approximately determined, the readings of such meters shall be corrected and such corrected reading shall be used as a basis for determining the amount of energy delivered. Where the registry of the meters cannot be so properly corrected, the amount of energy delivered during such period of inaccurate registry shall be estimated by the engineers for the parties hereto from the average daily plant output of energy during such period, and from any other available and pertinent data.

Fourteenth: Technical specifications, details and conditions as to the construction of the intercon-

necting lines and switching apparatus at Newark, and as to the maintenance, repair and operation of the power generating plant and transmission system of the City shall be agreed upon by the City Engineer of San Francisco and the Vice President in charge of electrical construction and operation of the Company, and a memorandum of such agreed specifications and operating details shall be filed with and become part of this agreement; provided, [55] that if any changes in said technical specifications or operating details may from time to time become necessary or advisable in the opinion of both of said parties, supplemental memoranda of the same shall be filed, and become part hereof without affecting the remaining terms of the agreement.

Fifteenth: The recitals hereinabove contained commencing with the words "Whereas, the City has now completed the construction of the Moccasin Power Plant," and ending with the words "a great loss of potential revenue to the City and its taxpayers; and" are statements made by the City of its purposes and intentions and concerning other matters contained in said recitals. Said recitals are not and no one of them is made by or on behalf of the Company. None of said recitals shall be binding on either of the parties to this agreement in any dispute, controversy or question which may ever hereafter arise in which the same might otherwise be relevant or pertinent.

In Witness Whereof, the Board of Public Works has caused these presents to be duly executed and

signed by its Members, and the Company has caused these presents to be executed by its officers first thereunto duly authorized by resolution of its Board of Directors, a copy of which is hereunto annexed, the day and year first above written.

BOARD OF PUBLIC WORKS
of the City and County of San Francisco,

By .....

By .....

By .....

Its Members

Attest:

.....

Secretary [56]

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,

By .....

Attest:

.....

Secretary

Section 2. As soon as said agreement is duly executed by the parties therein named, a duly executed copy or certified copy thereof shall forthwith be presented to the Secretary of the Interior of the United States at Washington, D. C. If said Secretary of the Interior shall upon presentation of the agreement to him, or at any time thereafter, announce his disapproval of said agreement, either directly or through the Attorney General of the United States, and direct that the same be cancelled, then said agreement will be subject to immediate cancellation as therein provided.

Section 3. This ordinance shall take effect immediately.

Finally Passed—Board of Supervisors, San Francisco, June 29, 1925.

Ayes: Supervisors Bath, Colman, Harrelson, Hayden, McGregor, McLaren, Morgan, Robb, Rossi, Schmitz, Wetmore.

Noes: Supervisors Badaracco, Deasy, Katz, McSheehy, Roncovieri, Shannon, Welch.

J. S. DUNNIGAN,
Clerk.

Approved, San Francisco, June 29, 1925.

JAMES ROLPH, JR.,
Mayor.

Service by copy of the foregoing original is hereby admitted this 20th day of July, 1937.

H. H. McPIKE,
Attorney for Plaintiff.

[Endorsed]: Filed July 20, 1937. [57]

[Title of District Court and Cause.]

OPINION.

Roche, District Judge: [58]

United States of America vs. City and County of San Francisco.

This is a suit in equity wherein the United States of America, as plaintiff, seeks to restrain the City and County of San Francisco, as defendant, from

continuing an activity which is alleged to be in violation of a restriction attached to a grant of lands by the plaintiff to the defendant. The grant is known as the Raker Act (38 Stats. 241), passed by Congress on Dec. 19, 1913. The restriction in question, contained in section 6 of the Act, reads as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

Pursuant to the Raker Act the City and County of San Francisco built a water and power system. Because the defendant lacked an electric distribution system within its territorial limits and was not able to build or purchase one at the time that electric energy was ready for delivery to consumers, it entered into a contract on July 1, 1925 for the disposal of electricity to the Pacific Gas and Electric Company. The plaintiff claims that under this contract the defendant is disposing of electric energy, developed and transmitted by it through its utilization of the rights granted the defendant in and on government lands by the Raker Act, in violation of the condition or restriction attached to that grant by the above quoted provision in section 6 of the Act. Plaintiff is proceeding to compel compliance under section 9.u of the Act, which reads as follows:

"That this grant is made to the grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

u. * * * That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

Hereinafter for convenience the plaintiff will be desig- [59] nated as the Government, the defendant, as the City or S. F., and the Pacific Gas and Electric Company, as the Company or the P. G. & E.

On August 24, 1935 the Secretary of the Interior rendered an opinion which declared that the City's disposal of electricity under the contract with the Company was in violation of the quoted part of section 6 of the Raker Act. The City, upon being advised of the Secretary's opinion and requested to cease its activity, gave notice that it intended to continue disposing of its electricity under the contract of July 1, 1925 until restrained from so doing by court action. Thereafter the necessary steps were

taken by the Secretary to place the matter in the hands of the Attorney General of the United States, who commenced these legal proceedings as provided for in the Raker Act.

The complaint of the Government alleges that the City is presently selling the electric power, generated by utilization of the grants of the Raker Act, to the P. G. & E. for resale, and that such activity is in violation of the limiting provision of section 6 of the Act. The City denies this allegation and sets up the contract with the Company as exhibit "A" of its answer as a primary defense for the activity which the Government contends is a sale for resale. In addition S. F. maintains that, even if the contract should be construed to be an arrangement for the sale of electricity for the purpose of resale, there are mitigating circumstances which make the issuance of an injunction improper. Estoppel, good faith and reasonableness of actions, balance of conveniences, change of conditions, and impossibility are urged as equitable defenses. Invalidity of the restriction, as in excess of the powers of Congress, is also claimed. These various defenses the court regards as secondary and will subsequently refer to them as such.

Before examining the facts and the law pertaining to the issues raised by the parties, it is necessary to understand the [60] background for the litigation. Therefore the court will present a brief history of the Hetch Hetchy project, with particular reference to the City's activities in the generation and

transmission of electric energy. Thereafter the court will dispose of its problems by an examination of them in the following order; 1. The restriction in section 6 of the Raker Act; 2. The question raised by the City's secondary defenses—the legal effect of the restriction in the grant; 3. The nature of the contract between the City and the Company; 4. Certain arguments made by the City as to the construction of the contract.

History of the Project.

On Dec. 19, 1913 the Raker Act was passed by Congress. It granted certain federal lands and rights to S. F. upon the condition that the water and power to be obtained from the contemplated project would be sold by the City directly to its inhabitants.[1]

The Act was the culmination of persistent efforts on the part of San Franciscans to assure themselves of adequate water and low rate electricity for their growing city. Work was begun on the Hetch Hetchy dam and power stations in the Yosemite region of the high Sierras soon after the Act became law. By 1923 the City was disposing of electric energy which it derived from the Early Intake power station (built as a preliminary unit for the

1. Section 9m of the Raker Act gave to the grantee certain water rights in addition to the lands granted. Since the court does not deem this feature of the Act necessary to the decision, it does not discuss it in the opinion.

construction of Hetch Hetchy itself).[2] On May 8th of that year the National Park Service started proceedings through the then Secretary of the Interior against the City. San Francisco's mode of distribution of Early Intake electricity through the facilities of the P. G. & E. was questioned. After proper hearings it was determined that energy was being *sold** to the Company in violation of the provisions of the Raker Act. Since the Mocassin Creek Power Plant (the chief future source of power for S. F.), was nearing completion at the time this decision was rendered, it was essential that a new plan for distributing electricity be adopted as soon as possible. [61]

To avoid further violation of the law governing Hetch Hetchy power, S. F. entered into a contract with the P. G. & E. in 1925, whereby arrangements were made for the utility company to distribute the City's energy on its behalf. The contract of July 1, 1925 was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act. Under this contract, City power was to be turned over to the Company at its Newark substation, about 35 miles southeast of S. F. The Company was to pay the City on a 75% load factor

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*Italics in this Opinion are by the Court.

2. Altho Early Intake power was disposed of under a different arrangement from that of the Mocassin Creek Plant until the last few years, the court will treat S. F. power as a unit, since it is now all handled under the contract of 1925.

basis for electricity made available by the Hetch Hetchy power plants.[3] Line losses, estimated at 24% of the energy received by the Company at Newark, were to be deducted from the electricity actually delivered, in determining payments due to the City. Of the money collected from San Francisco consumers of electricity supplied by the Hetch Hetchy power plants, the City was to receive 26.935% and the Company, 73.065%. These proportions were to be applied to the payments made by customers, who were charged 2.383¢ per kilowatt hour at the time the contract went into effect. As rates were varied, the payments were to be adjusted accordingly, so that the percentages remained fixed during the life of the contract between the City and the Company. The City was to be paid by the Company whether the latter used all of the Hetch Hetchy power or not, and whether the Company "load dispatcher" accepted the energy generated in the City power plants at Mocassin Creek and Early Intake in whole or in part. The contract was made terminable on one day's notice by either side or upon the request of the Secretary of the Interior, should he find it to be in violation of the Raker Act.[4]

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3. Load Factor—ratio of the average load to the capacity.

4. This latter provision in the contract must not be confused with section 9u of the Raker Act, under which section the Secretary must start proceedings through the Attorney General, if the Act is being violated by a sale of electricity to a private company for purposes of resale.

In 1925 the new contract between the City and the Company became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in section 6 of the Act. Thereafter verbal and written encounters took place intermittently between the City and the Government, but it was not until 1934 that the [62] present controversy threatened to reach legal proportions. In that year the Secretary of the Interior started an investigation to determine whether S. F. was complying with its obligations under the Raker Act. The results of conferences, hearings and study were contained in an opinion of the Secretary, who concluded that the Act was being violated (plaintiff's exhibit "11") the subsequent proceedings by which a suit arose and reached the United States District Court have been outlined above.

The chief issue to be settled by the court in the present controversy is this: Does the City's present disposal of electric power under the contract of July 1, 1925, made by the City and the Company, violate section 6 of the Raker Act?

The Restriction in Section Six of the Raker Act.

As a necessary preliminary to a study of the contract, the conditions set forth in section 6 must be carefully examined in order to ascertain what kind of arrangement would be permitted between the City and the Company. The court again recites the language in section 6:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee."

What was intended by Congress when it placed this prohibition in the Raker Act? An approved method of approach for obtaining an answer to this question was stated in the case of Oregon and California Railroad v. United States (1915), 238 U. S. 393 at page 417, where the Supreme Court said: "To construe a statute we must realize its inducements and aims, solving disputes about them by a consideration of what might accomplish or defeat such aims."

The aims of the Raker Act were made apparent by both the [63] Senators and the Representatives who discussed the bill during the months preceding its passage in 1913. Pertinent remarks are those of Representatives Summers, Raker and Thompson before the House of Representatives and of Senator Norris before the Senate:

> Representative Summers: "Is it the purpose of this bill to have San Francisco supply electrical power and water to its own people?" Representative Raker: "Yes." Representative Summers: "Or to supply these corporations, which will in turn supply the people?" Representative Raker: "Under this bill it is to sup-

ply its own inhabitants first. * * *"—Congressional Record, Volume 50, p. 1905. (1913)

Representative Thompson: "* * * San Francisco may sell this water or electric energy to whom? * * * under this section (six), it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it."

In response to the question of a Congressman who feared that a private company might resell electricity which the company had purchased from the City: "And it should be added that that lessee, unless it is a municipal corporation, is by the terms of the bill confined to somebody who wants to use this for consumption."—Congressional Rec., Vol. 50, p. 4097.

Senator Norris: "* * * This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. * * * This proposition is to harness that power and to put it to public use, not to give it to a private corporation. Why do we want to develop water power? Will we give it to the public or to a private corporation?

"Here is an instance where we are going to give it directly to the people, if we pass the bill."—Cong. Rec., Vo. 51, p. 343.

Thus it must be inferred that section 6 was enacted to insure the direct distribution of water and power by the City to its inhabitants. The language of the section makes it clear that no private corporation was to enjoy any profits from the government grant, which was to be enjoyed in its entirety by the consumers.

Secondary Defenses.

Before approaching the chief issue in the case, the court will give its attention to what has been previously characterized as the City's secondary defenses. The basis for all of these defenses is the City's contention that the provision in section 6 which is alleged to be violated is not to be viewed as a valid and enforceable law but is at most a covenant dependent for its enforcement on the same principles of law and equity as [64] are applicable to a similar covenant between private parties. The Government asserts that the disputed section is a law, and entitled to the sanctity of a law. Since the effect of the City's secondary defenses hinges on the court's interpretation of section 6, the status of that section will be determined.

Congress does not have power to prescribe the regulations for the sale of electricity by a municipality. From this premise, the City argues that section 6 of the Raker Act is not a law but is a simple contract between the grantor and the grantee. To the Government's contention that the Act is a law in its entirety, S. F. replies that the conditions

imposed in the grant are set up by the Government acting in a proprietary rather than a sovereign capacity and that as to these conditions, the Government is in the same position as a private person, who would make the same sort of contract.

This line of reasoning is not sound. The fact that the federal government may lack the power to impose direct police regulations does not mean that any regulatory measure which is passed as an integral part of a valid piece of legislation cannot be enforced except as a simple contract. One part of a statute is as much a law as is any other part of the enactment. If Congress has the power to include a policing condition in a grant, then that condition is entitled to the full force of the law. Oregon & Cal. R. R. v. U. S., above; Wisconsin Gen. R. Co. v. Forsythe (1895) 159 U. S. 46, 55; Missouri, etc. R. Co. v. Kansas, etc. Ry. Co. (1877) 97 U. S. 491, 497; Schulenberg v. Harriman (1874) 21 Wall. 44, 62, and numerous other authorities hold that a granting act is a unified *law* as well as a grant. It is not subject to partition to suit the whims of the grantee.

Authority for a conditional grant of federal lands is found in Article IV, section 3 of the Constitution, which reads:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

The following language from Light v. U. S. (1910) 220 U. S. 523 at [65] pages 536 and 537, indicates the scope of the rule making power of Congress, as expressed by the Supreme Court:

> "The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. * * * It is true that the 'United States do not and cannot hold property as a monarch may for private or personal purposes'. * * * But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, section 3 Article IV, that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States'. 'The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.' * * *
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> "'All the public lands of the nation are held in trust for the people of the whole country.' * * * 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'"

To the same effect are Utah Power and Light Company v. U. S. (1917) 243 U. S. 389 and Ruddy v. Rossi (1918) 248 U. S. 104.

In the Hetch Hetchy grant, there is an enactment of what Congress deemed to be "Needful rules and regulations" for the administration of federal lands granted to the City and County of San Francisco. It should be clear that the Government has power to make such rules and impose such conditions in conjunction with grants of its lands, and that those rules take on the force of law when the grant in which they are contained is itself made by Congress acting in its law making capacity. Such is the situation in the case at bar. The limitation on the distribution of electric energy was within the law making power of Congress, since it was directly connected with a grant of federal lands (Art. IV, sec. 3). The collateral nature of the condition—distribution of electricity *over* the lands—is well within the land disposal power of Congress (Ruddy v. Rossi, above).[5]

A careful reading of the above quoted clause of the Constitution and a review of the cases governed by it, lead the court to hold that Congress has express power to impose the condition which is set forth in section 6. If S. F. wished to enjoy the benefits of the grant, it was compelled to assume the burdens, however onerous they may have been.

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5. In this case, lien limitations, placed on complete strangers to lands patented by the Government, were sustained as valid conditions imposed by the Government in disposing of its lands. Such limitations obviously did not deal with the actual use of the lands patented.

The law in the case of Oregon & Cal. R. R. v. U. S., above, [66] is generally applicable to the present situation. Because that case effectively disposes of the City's secondary defenses, the court will summarize the opinion, and quote freely from the language used by Mr. Justice McKenna:

By amendatory acts of Congress in 1869 and 1870, certain public lands were granted to railroad companies, subject to numerous conditions touching upon the use and disposal of the lands granted.[6] For some time the railroads complied with the requirements contained in the grants. But afterwards the conditions imposed by the Government were openly violated. Such conduct, persisted in over a period of years, finally led to a suit whereby forfeiture was sought by the United States Government, or, in the alternative, an injunction against further violation of the grants.

After concluding that the restrictions in the grants were not conditions subsequent which entitled the Government to forfeiture, but that they were enforceable covenants, the court ruled that *neither estoppel, waiver, reasonableness, nor any other equitable argument merited consideration in*

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6. The disputed limitation in the Oregon case was upon the alienation of the lands granted; the restriction in the principal case is upon the use of the lands. Both limitations are "needful rules" within the land disposal powers of Congress, despite their differenf purposes.

view of the fact that a law was involved.[7] In showing that the right to equitable relief does not require the plaintiff to prove damages in such an action, the court said, at page 422: "The language of the grants and the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the *acts are laws as well as grants and must be given the exactness of laws.*" (Emphasis supplied.).

The argument was presented that the character of the lands was such that it was not possible for the railroads to comply with the conditions imposed in the grants. The court was not impressed by this defense, and said, on page 428: "The [67] character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action."[8] The conditions in the land grants were then found to be enforceable and the railroads were enjoined from further violation of them.

The above summary shows that the Oregon decision is controlling in the principal case on the sec-

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7. It is to be noted that the various defenses in the Oregon case and those in the principal case are almost identical.

8. The "impossibility" defense of the City is answered by this statement.

ondary issues raised by the City.[9] The defenses set up by S. F., except for the nature of the contract itself, are immaterial because, as Mr. Justice McKenna said in the Oregon case at page 435: "Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants, but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, whatever the difficulties of performance, relief could have been applied for and, it might be, have been secured through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to."

The Raker Act was passed by Congress acting in its lawmaking capacity. The enactment is a law in its entirety; therefore the court, in accordance with the ruling in the Oregon case, must dismiss the secondary defenses relied upon by the City and turn to the agreement between the City and the

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9. Considerable evidence was presented at the trial, subject to the Government's motion to strike, dealing with the secondary issues; other evidence on these same issues was excluded. In submitting the case, both sides have made motions with respect to this evidence—the Government, to strike it; the City to reopen the case for the purpose of introducing the rejected evidence. The Oregon case makes it clear that the court must grant the motion to strike and deny the motion to reopen.

Company to determine whether it is a contract for the sale of electricity for resale or a contract of agency whereby the City distributes its own power thru an agent.

Nature of the Agreement Between the City and the Company

The Government has alleged that the City is not distributing energy thru the Company as an agent, but is selling electricity to it for resale in violation of section 6 of the Raker Act. The City denies this allegation and contends that it has [68] entered into an agency agreement whereby it distributes its own power.

How is the court to distinguish agency from sale? The intent of the parties, as shown by the language used in the instrument before the court, will be given weight in determining whether an agency relationship has been established. But the substance of a contract controls its construction despite any language of consignment which may be used. Greenough v. Wilcox (1927) 238 Mich. 52, 213 N. W. 175; Chezum v. Kreigbrum (1892) 4 Wash. 680, 30 P. 1098; Standard Co. v. Houston Co. (1921) 258 U. S. 346; Straus v. Victor Talking Machine Co. (1916) 243 U. S. 490, 498; Ex parte Flannagans (1875) Fed. Cas. No. 4855; Vt. Marble Co. v. Brow (1895) 109 Cal. 206, 41 P. 1031; 1 Mechem, Sales #46, p. 45; Restatement of Agency #1, b. The instrument must be dissected into its component parts, which, under close scrutiny, must reveal true

agency. This method of analysis is recognized as proper in Marriman etc. Inc. v. Fort Dodge Serum Co. (1931) 47 F2d 458, where it is said at page 460 by Judge Booth:

> " . . . In recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and of their lawyers have evolved a class of contracts which have the earmarks of both sale contracts and factorage contracts. It is not always easy to determine into which class a particular contract falls. If it becomes necessary to decide the question, all the court can do is to consider the various earmarks as disclosed by the contract, and the surrounding facts and circumstances, and determine, as best it can, into which class the contract should be placed."

Mechem analyzes the essential characteristics of an agency to sell as follows:

> "The essence of agency to sell is the delivery of goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to fix the price and terms, to recall the goods, and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent." 1 Mechem, Agency (2d Ed.) #48, p. 30.

With these elements of agency before us, we shall consider the contentions of the Government and the City by asking the following questions:

1. Who controls the product—the alleged principal or the agent? [69]

2. Who assumes the risk of loss?

3. Upon what basis is payment to be made to the alleged principal?

4. Who fixes the price and terms of sale?

5. Who purchases the product?

6. How are collections made from purchasers?

7. What is done with the proceeds of sales?

8. How does the alleged agent account to the principal?

9. How does the alleged principal make its own purchases?

10. When does the relationship terminate?

The answers to these questions will enable the court to decide what kind of agreement has been entered into by the City and the Company.

Under the contract, who controls the Hetch Hetchy electricity—the alleged principal or the agent? Hetch Hetchy power is to be delivered to the Company's Newark substation, where it becomes a part of the Company's energy. Thereafter control is entirely in the hands of the Company, whose load dispatcher directs the movements of the electricity after determining how much electricity will be accepted in the first instance. The City has no further interest in the power except the receipt of money for its delivery to the Company. Supervision rests

in the load dispatcher. Such control by the Company points toward a sale, since agency is characterized by control being retained by the principal (Black v. Webb (1851) 20 Ohio 304, 55 A. D. 456; Restatement of Agency #1 and #14b).

Does the alleged principal assume the risk of loss? Based on experience gained prior to 1925, distribution losses amounting to 24% of the energy delivered at Newark are to be deducted from the total delivered, and payment on such balance is to be 26.935% to the City and 73.065% to the Company of the average revenue to be derived from the sale of the power, such revenue amounting to 2.383¢ per kilowatt hour—computed on the rates of 1924. The deduction of 24% from the energy delivered at Newark in fixing the amount due the City, is an attempt to place the risk of line losses on the City, as the principal. [70] While it may be argued that this provision is at least indicative of agency, it is not unusual in sales contracts for the parties to require the seller to assume the risk. Furthermore, in the principal case, the deduction term may be present simply as a necessary factor in determining the correct price to be paid the City for its electricity.[10]

Upon what basis is payment of money, collected from consumers of electricity to be made to S. F.?

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10. It is worth noting that under the accounting system of the Company, no risk of credit loss is placed on the City, although such risk is often found in agency relationships.

Under the written contract, proceeds from purchasers of electric power are to be paid on a proportional basis. The City alleges that proportional payment is normally found in agency agreements.[11] If this is so, and the instant contract set up an agency relationship, then a change in rates *would* cause a proportional change in the amounts received by the City and the Company. Actually, no changes in revenue payments to the City have been made since 1925, despite several reductions in Company rates. The price paid S. F. has remained constant, despite the provision for proportional payment which is contained in the contract.

Conduct is entitled to the court's attention, especially when a written instrument is drafted in order to satisfy the requirements of a specific statute. If the price which S. F. receives under the contract is actually fixed, this is strong indication of a sale (In re Rabeau (1902) 118 F. 471; City of San Antonio v. Chas. M. Steiff, Inc. (1935) Tex. Civ. App., 83 S. W. 2d 357).

It has been argued by the City that increased consumption of electricity has tended to keep rev-

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11. The proportional payment basis does not preclude a sale from being consummated. This is made plain in the case of Public Utilities Commission v. Landon (1918) 249 U. S. 236, where a sale of gas was found under a contract by which the seller and the buyer were paid on a percentage basis. Although the Supreme Court did not discuss the agency question, it played an important role in the decision of the lower court and undoubtedly influenced the appellate body.

enue almost constant, thus obviating the necessity for periodical adjustments; that is to say, consumption has increased directly and automatically with the lowering of rates. However, the failure of the Company to request changes in payments to the City, upon sizable rate reductions and correspondingly reduced returns, is best explained by the theory that before such lowering of rates, the Company was enjoying more than its contract share of the income received from consumers of electricity; that with the reduction of rates, [71] the Company received less than the sum to which it was entitled under the contract with the City, and thus, over a period of years, a close approximation to the contract percentages was maintained. But such compliance with the contract payment provisions—by averaging the returns to the City—does not spell agency. The fact that payments have remained constant since 1925 points toward a sale of electricity to the Company at a fixed price.

If the Company would not be able to accept and distribute the power offered it; payment must nonetheless be made to the City on the basis of the energy which it *could* have delivered to Newark. Electricity is to be paid for on a 75% load factor basis regardless of actual sales to consumers. Duty to pay for a product whether it is accepted or used is normally found in a contract of sale. (Swift & Co. v. Columbus etc. Electric Co. (1926) 17 F2d 46, in which there was a duty to pay for electricity under a sale contract; no question of agency was

involved. In re Sachs (1929) 31 F2d 799; Ferry Co. v. Hall (1914) 188 Ala. 178, 66 So. 104; Coweta Fertilizer Co. v. Brown (1908) 163 F. 162; Peoria Mfg. Co. v. Lyons (1894) 153 Ill. 427, 38 N. E. 661; 1 Mechem, Sales, #43, p. 41.) Such a duty is very rarely discoverable in an agency contract, except on an option basis. (In re Thomas (1916) 231 F. 513.) In fact, a provision in a contract by which the seller is assured of a payment for his goods, regardless of the buyer's ability to dispose of them, is so important in establishing a sale that the California Supreme Court, in the case of Los Angeles Gas & Electric Co. v. L. A. (1922) 188 Cal. 307, 205 P. 125, indicated that the difference between agency and sale might well hinge upon such a duty-to-pay requirement.

In the Los Angeles case, as in the S. F. controversy, a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private com- [72] panies. The agency contract under which the companies were operating was challenged. The question before the court, as in this case, was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that the city charter was not being violated. Of the numerous provisions which the court studied, no one alone convinced the judges that the contract

was within the requirements of the charter. However, the absence *or* one provision—which is present in the case at bar and with which the court is now dealing—impressed the court enough to warrant the following dictum at page 316:

> "It would seem that the determination as to whether or not the so-called operating agreement is in effect a sale of electrical energy at wholesale to the contracting companies, or is a method of distributing the power of the city to its consumers, would turn in part upon the question as to whether or not the return to the city would be regulated solely with reference to the quantity of power furnished by the city. If the contract was so arranged that the city would at all times receive a definite amount for the power furnished, regardless of the hazards of the business or the expense of distribution, then it might be argued with some force that it was a sale within the meaning of the charter prohibiting such a transaction."

The court has already pointed out that in the principal case the City was to receive a definite amount for Hetch Hetchy electricity, regardless of actual demand for the energy by the Company. The P. G. & E. has a duty to pay S. F. for electricity available at Newark, on the basis of a 75% load factor. That duty might not be fatal to an agency contract; but it deserves fully as much weight as the Los

Angeles case would give it.[12] In a normal agency, the agent effects a transfer and is not responsible for payment unless the commodity is actually delivered to him and sold by him.[13]

Who fixes the price at which electricity is to be sold to consumers? Rates to be charged consumers are not fixed by the City. They are expressly left in the hands of the State Railroad Commission. When prices are set by the one who disposes of the commodity, then the transaction is normally one

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12. Defendant, in presenting its agency arguments, placed much reliance on the Los Angeles decision. In addition to the duty-to-pay provision which is present in the S. F. case and absent from the Los Angeles contract, the two cases are further distinguishable. The contract between Los Angeles and the private companies provided that the city buy 25,000 horse power of electricity, so that *all* energy in the lines would be owned by the city, and the companies would act solely in the capacity of distributing agents. Under the contract between S. F. and the Company, the power which the latter distributes is the City's electricity in part only. Because of the nature of electricity, it is almost essential that *all* energy be owned by the City if it would enter into an agency relationship. This will be explained by the court in its opinion.

13. As a practical matter, S. F. has been able to utilize the full capacity of Hetch Hetchy power even during off-peak periods. Thus the Company has not been forced to pay for electricity which it has neither accepted nor sold. The written contract is inconsistent with an agency agreement, but the fulfillment of its duty-to-pay provision is not. As carried out, the 75% load factor term has meant that preference is given to Hetch Hetchy energy by the Company, when consumer demand is low.

of sale. (In re Wayside Furniture Co. (1933) 67 F2d 201; City of San Antonio v. Chas. M. Steiff, above; Chickering v. Bastress (1889) [73] 130 Ill. 206, 22 N. E. 542.) It is true that the Company does not fix rates, since it is a public utility whose schedule of charges is in the hands of the Railroad Commission. But the very fact that the Commission, instead of the City, fixes rates tends to exclude the possibility of agency. The Constitution of California (Art. XII, sec. 23), declares that municipalities are not subject to commission regulation as are the private companies which serve as public utilities. If the P. G. & E. were acting as an agent on behalf of the City, then S. F. would be the proper party for fixing its own rates. The fact that the City does not set its rates is indicative of a sale. However, since the City does not furnish *all* the electricity which is supplied to S. F. consumers, it would not be possible for the City to fix charges for electricity supplied by it. Feasibility requires the present mode of rate fixing, notwithstanding the fact that a principal ordinarily sets the prices at which his agent will sell goods.

Who purchases the electricity? How are the purchasers billed? What is done with the proceeds from the sale of electricity? Electricity is to be disposed of by the Company to its usual customers, in the normal course of retail trade; customers are billed in the name of the Company, and money which is so collected from them is mingled with Company funds.

Disposal of goods to regular customers in the usual course of trade indicates a sale (Public Utilities Comm. v. Landon, (1918) 249 U. S. 236), as does the billing of goods in the name of the retailer (except in an undisclosed agency). Commingling of funds collected from purchasers is characteristic of a sale (In re U. S. Electrical Supply Co. (1924) 2 F2d 378). To justify the mingling of *funds*, the City relies upon numerous grain cases. But a glance at these citations will show that they stand for the proposition that a mingling of goods is not considered irregular in many agency contracts. However, the grain broker, when serving as an agent, customarily keeps sepa- [74] rate accounts for those with whom he transacts business. Of necessity certain products must be mingled, but the proceeds from their sale are placed in the different accounts of each contributor according to his prorata interest in the whole. Electricity, while different from grain, has been held to be personal property for legal purposes, and subject to the rules governing personal property. (Terrace Water Co. v. San Antonio, etc., Co. (1905) 1 Cal. App. 511, 82 P. 562; Lothrop Theatres Co. v. Edison, etc. Co. (1935) 290 Mass. 189, 195 N. E. 305, 307.) Thus the funds collected from S. F. consumers would be kept separate were this an agency contract. But again, the nature of the product makes this separation impossible, except on an arbitrary basis.

Does the Company submit a record of its electric sales to consumers, to the City at the end of each

month? No accounting is made to the City, which simply bills the Company for electricity transmitted to Newark. The accounting procedure is limited to the delivery by the City to the Company, altho in an agency relationship the agent accounts to the principal. Of course, where information is available to the principal, there is no real need for an accounting. In the case at bar the City can obtain considerable statistical information, by requesting a monthly report from the local utilities commission. But such report would not disclose the percent of S. F. electricity sold to the public, for the nature of the product prevents such a record from being kept.

What is the arrangement for the purchase of electricity by the alleged principal from the agent? The City itself purchases electricity from the Company just as any other customer does. Yet purchased by the principal from the agent are very uncommon in agency contracts; they are inconsistent with an agency interpretation; instead they constitute proof of sale.

When does the relationship between the City and the Company end? The contract between the City and the Company is terminable upon one day's notice by either party, or upon request of the [75] Secretary of the Interior, if he should find that it violates the Raker Act. Such a cancellation provision may be indicative of agency (In re Galt (1903) 120 F. 64). But it is of only slight significance in the S. F. case because an important reason for the

one-day provision is made manifest by the second ground upon which cancellation may be brought about, namely, a violation of the Raker Act.

The following review of the analysis which has been completed will show that the agreement between the City and the Company is clearly one for the sale of electricity:

1. Control of Hetch Hetchy power is in the hands of the Company from the moment that City electricity enters the Company lines at Newark.

2. The price which S. F. receives for its Hetch Hetchy power has remained fixed, despite fluctuations in Company income.

3. The 24% deduction of electric energy from the amount of Hetch Hetchy power delivered at Newark—based on line losses of electricity between Newark and S. F.—is a factor considered in ascertaining a fair price for the sale of electricity by the City to the Company.

4. There is a duty imposed upon the Company to pay for Hetch Hetchy power on a 75% load factor basis, regardless of Company needs.

5. Rates to be charged consumers of Hetch Hetchy power are not fixed by the City.

6. Hetch Hetchy power is disposed of by the Company to its usual customers in the normal course of business.

7. Consumers of Hetch Hetchy power are billed in the Company name.

8. Accounting between the City and the Company is limited to S. F.'s billing the P. G. & E. for

Hetch Hetchy power delivered at Newark each month.

9. The City is itself a purchaser of Hetch Hetchy power from the Company. [76]

10. The Secretary of the Interior may request a cancellation of the contract, should he find it to be in violation of section 6 of the Raker Act.

There is no clear cut line which divides sales contracts from agency agreements. If the earmarks of sale predominate, then a sales contract exists. The fact that individual sales provisions may be explained away, on the ground that their presence has been tolerated by courts which have found them in agency relationships, does not lend weight to an agency interpretation; and when such sales provisions appear together, they are strong proof of a sale. In the principal case the elements of sale compel the court to declare the contract to be one of sale, with title to the electricity passing to the Company at Newark. Viewed in the light of the history of the Raker Act, the present arrangement is seen to comply neither with the letter nor the spirit of the federal grant by means of which S. F. was enabled to construct the Hetch Hetchy project.

The nature of the product is one explanation for the kind of contract which was entered into by the City and the Company, and also, for the Government's contention that even an agency agreement might be beyond the limitations imposed by section 6 of the Raker Act. Electricity has been defined

in Webster's 1937 dictionary, as "an imponderable and invisible agent producing light, heat, chemical decomposition, and other physical phenomena". This unknown agent has been declared to be personal property for legal purposes; but it is a peculiar kind of property which cannot be stored in sizable quantities and cannot be allocated on a pro-rata basis when a commingling occurs. Because of its mysterious character, and the difficulty of handling it thru agency facilities, any contract which deals with its disposal under a *pooling* arrangement must necessarily contain numerous elements which are usually found in sales contracts. These elements may not entirely preclude an agency relationship; yet, when combined with fundamental sales provisions, they make [77] the agency relationship extremely improbable. If all the electricity supplied to the inhabitants of a municipality should be owned by the municipality, an agency relationship for the distribution of electric energy might be set up, without perverting the meaning of the word "agency"; but where only some of the electricity is furnished by the municipality, it is doubtful whether a true agency contract could be drafted.

Arguments as to Construction of Contract

The City, in addition to submitting its own reasons for interpreting the contract with the Company as one of agency, has suggested that the construction placed upon the instrument by several federal officers is controlling. It is alleged by S. F. that responsible government officials have already passed

upon the contract; that they have indicated that it is an agency agreement; that their contemporaneous opinions are entitled to the respect of the court.[14]

It is true that the contemporaneous construction of a contract by government officials must be given weight in determining its nature. But the doctrine of contemporaneous construction relied upon by the City refers to the construction of the instrument which must be administered by government officers, and not to some other document, such as the contract in the principal case. This is made plain by defendant's own quotation from 59 Corpus Juris 1025, #609:

> "The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it, is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the government."

Thus it is apparent that the opinion of the Secretary of the Interior must be given due regard when it is applied to the Raker Act. But the Secretary's views about a private contract are not entitled to the same consideration, even tho an interpretation of that contract is necessary in order to invoke the statute. If, however, the court should treat the

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14. The contemporaneous construction argument was also presented in support of the City's estoppel defense, which the court has disposed of under the doctrine of the Oregon case.

contract be- [78] tween the City and the Company as so closely related to the Raker Act as to apply—by analogy—the rule that an interpretation of a statute by a department head must be given great weight (U. S. v. Jackson (1930) 280 U. S. 183; Bates & Guild Co. v. Payne (1903) 194 U. S. 106; People v. S. P. Co. (1930) 209 Cal. 578, 290 P. 251), then what may be learned about the agreement before the court?

Shortly after the controversial contract was put into effect, the instrument was shown to the then Secretary of the Interior. No complaint was registered by the Secretary after his examination of the document. Yet it cannot be said that his silence amounted to an express sanction of its provisions. His negative behavior might be an indication, at best, that he considered the contract a temporary stop-gap until such a time as the City would be able to acquire its own distributing system. Neither the Secretary in 1925 nor his immediate successors made a serious effort to interpret the contract for purposes of challenging it or approving it, for all of them expected the City to fulfill its obligations under the Raker Act. In 1934 for the first time an exhaustive study of the contract was made by the incumbent Secretary, Ickes, and he concluded that it resulted in a violation of section 6 of the Raker Act. The opinions of the prior Secretaries were seldom expressed. When statements were issued, as in the case of the Secretary in office in 1930, they

were not favorable to the City's contentions (Transcript 127½, Defendant's Exhibit "B"). Toleration of the contract over a period of years does not lend much weight to an agency interpretation; the opinion of the now Secretary of the Interior supports a sales construction. The doctrine of contemporaneous construction thus fortifies the interpretation of the contract already made by the court.

Where a valid law is enacted, there must be compliance with its provisions. An injunction is the proper remedy for [79] compelling such compliance (Oregon & Cal. R. R. v. U. S., above), unless money damages will afford adequate relief (World Exposition v. U. S. (1893) 56 F. 264). The injury to the Government caused by the City's violation of the Raker Act cannot be measured in terms of money damages. Therefore S. F. must observe the conditions in the Raker Act. If a law is unworkable, it must not be circumvented by those whom it binds; rather an effort should be made to have the law amended by the Congress. The Raker Act is a valid law, the provisions of which S. F. must obey. A violation of this law the court must enjoin regardless of the reason for the violation (Oregon & Cal. R. R. v. U. S., above). Section 6 does not permit a sale of electricity to a private corporation for purposes of resale. The Raker Act is not being complied with by S. F. Under these circumstances, the court holds that the Government is entitled to an injunction directing the City to cease its present disposal of electric power or be restrained from using

the rights granted by the Raker Act for the generation and transmission of such power.

Such injunction, however, will not be made immediately operative. At present S. F. is collecting in excess of $2,000,000 per year from the Company; there has been intimation that the Hetch Hetchy power is a necessary augmentation of the Company's system; the City has been operating under the contract with the Company for almost thirteen years; a sudden disruption of operations would result in serious economic waste. These factors weigh heavily with the court. In order that the City may face its problem and comply with its obligations under section 6 of the Raker Act, the court will make its injunction issuable forthwith, but effective six months from the date of its issue.

This opinion may stand in lieu of the written findings of facts and conclusions of law. Each party is to pay its own costs.

Dated: April 11, 1938.

MICHAEL J. ROCHE
United States District Judge. [80]

[Endorsed]: Filed Apr. 11, 1938.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial in the above entitled court, Honorable Michael J. Roche, Judge of said court presiding, on Octo-

ber 19, 1937, the plaintiff United States of America being represented by its attorneys Frank J. Hennessy, United States Attorney for the Northern District of California, W. E. Licking, Assistant United States Attorney, and Frederic L. Kirgis; the defendant City and County of San Francisco being represented by John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Robert M. Searles; whereupon evidence both [84] oral and documentary on behalf of the parties was offered and received and the cause regularly continued to October 21, 1937, at which time leave was granted the parties to file briefs, and said briefs having been filed and the matter argued orally by the parties on March twenty-first, and twenty-second, 1938, and the case having been submitted to the court for its decision on the latter date; the court having duly considered the evidence and the briefs and arguments of counsel and having on April 11th rendered its decision herein in favor of plaintiff together with its written opinion in support thereof, and being fully advised in the premises, now makes the following special findings of fact and reaches the following conclusions of law:

Findings of Fact

I.

The defendant City and County of San Francisco, hereinafter referred to as the City, is a municipal corporation of the State of California.

The Pacific Gas & Electric Company, hereinafter referred to as the Company, is a private California corporation, engaged in the business of distribution and sale of electric energy in the City and County of San Francisco and elsewhere.

II.

For a number of years prior to December 19, 1913, the City had been seeking to assure itself of adequate water and low rate electricity by a plan known as the Hetch Hetchy project. By the terms of the Raker Act of December 19, 1913 (38. Stat. 242) the United States, acting through the Congress [85] granted to the City lands and certain rights and privileges in its lands; among the rights and privileges so granted was the right to utilize the granted lands and their appurtenant resources for the development of electric energy, including the storage and transmission of water necessary for the generation of electric energy and the transmission of electricity generated.

The grant so made by the United States was conditional upon the acceptance by the City of the terms and conditions therein specified.

III.

Thereafter, the City of San Francisco, through an ordinance passed by its Board of Supervisors and approved by its Mayor, January 13, 1914, did accept said grants contained in the Raker Act and acquiesced in, and became bound by the terms and conditions thereof.

IV.

To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant, it was provided in the Raker Act:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it by the said grantee."

V.

Prior to July 1, 1925 the City had entered into the use and enjoyment of the lands, rights and privileges granted by the Raker Act and was then, and is now, generating and [86] transmitting electric energy through its utilization thereof.

VI.

The lands and rights acquired by the City from the United States are indispensable to the operation of the City's Hetch Hetchy project, although it includes lands and rights other than those acquired from the United States under the Raker Act.

VII.

On July 1, 1925 the City entered into a contract with the Company for the distribution and sale of electric energy generated by the City at its

Moccasin Creek Power Plant, part of the so-called Hetch Hetchy project. A true and correct copy of the contract is filed with the City's answer, marked "Exhibit A" thereof, and is made a part of this finding by reference.

VIII.

Since July 1, 1925, electric energy originating at the Moccasin Creek Power Plant of the City, and since late in 1935, the electric energy originating at the City's Early Intake plant, all generated and transmitted through utilization of the lands, rights and privileges granted to the City by the United States, has been, and is now being delivered to the Company under the terms of the contract executed between the the City and the Company on July 1, 1925. Electric energy generated at both plants is hereinafter referred to as that originating at Hetch Hetchy. [87]

IX.

Under the contract, by its terms, and as shown by the activities of the contracting parties thereunder:

1. Power developed by the City at Hetch Hetchy is delivered to the Company at its Newark substation, 35 miles southeast of San Francisco. Determination of how much electricity shall be accepted at any given time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the opera-

tion and output of the City's plants. From the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark the City is without power over, and the Company has exclusive and entire control of, its disposition.

2. In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of *receipt of* the energy from the City by the Company at Newark and delivery to the ultimate consumers. Deduction of 24 per cent of the Hetch Hetchy energy delivered by the City to the Company at Newark is simply a necessary factor in the formula for ascertainment of the amount to be paid by the Company to the City as a fair price for such energy.

3. By the terms of the contract the Company is required to "account for and pay over to the City for the energy so consigned and delivered to it by the City of Newark for transmission and distribution to consumers as provide in this contract 24.935 per cent of 2.383 cents per kilowatt hour, (the average revenue received by the Company in 1924) for 76 per cent of the energy so consigned [88] and delivered by the City to it at Newark. And the Company shall retain * * * 73.065 per cent as its compensation for services rendered under this contract." The proportional percentages

—26.935 and 73.065—were to remain fixed during the life of the contract between the City and the Company. As rates varied, amounts of payments to the City were to be adjusted accordingly.

In actual practice the amount per unit received by the City for its electric energy delivered under the contract has remained constant, despite several reductions in the rates charged by the Company and appreciable fluctuation in the average amount per unit received by the Company from its sale. The price, therefore, which the City receives for its energy under the contract is in practice fixed and without relation to the actual revenue received from its sale to consumers.

4. With exceptions here immaterial the Company accepts at Newark the entire output of energy from Hetch Hetchy at not to exceed a 75 per cent monthly load factor. Monthly payments by the Company to the City are based upon the amount of energy actually delivered into the Company's system at Newark; or, in event of failure of the Company to take the available output of the City's plant deliverable at Newark under the contract, upon the amount which the City could have delivered at a 75 per cent load factor. The City is assured of payment and the Company is under an absolute duty to pay for the amount of electric energy specified without regard to its acceptance or use.

5. The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not

by the City but by the State Railroad Commission. Under the State Constitution, municipalities are not subject to commission regula- [89] tion, and as a principal the City has power thereunder to fix rates for electric energy produced by it, and sold by an agent, if there be an agent.

6. Electric energy originating at Hetch Hetchy is disposed of by the Company to its usual customers in the normal course of its retail trade.

7. The Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy including that originating at Hetch Hetchy.

8. Moneys collected by the Company from consumers of power are in no way, arbitrarily or otherwise, segregated or apportioned with regard to the portion thereof deemed attributable to power produced at Hetch Hetchy.

9. To the City the Company makes no accounting of its sales of electricity to consumers. Accounting between the two is limited to monthly statements by the City to the Company for electricity delivered at Newark.

10. The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City.

11. The contract is terminable by either the City or the Company upon one day's notice; and is

by its terms subject to cancellation upon request of the Secretary of the Interior should he determine the agreement to be violative of any section of the Raker Act.

X.

The contract between the City and the Company is a contract to sell for resale, and the disposal of electric [90] energy thereunder by the City to the Company constitutes a sale for resale of, electric energy generated by the City at Hetch Hetchy. The contract to sell contemplates, and the sale of energy thereunder includes, a sale or letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark.

XI.

The contract between the City and the Company and the disposal of electric energy thereunder by the City to the Company includes a sale or letting by the City to the Company of the right to resell or sublet the electric energy so delivered by the City to the Company.

XII.

The Secretary of the Interior is designated by the Raker Act to safeguard the interest of the United States in its grant. Pursuant to such duty imposed by the Act, the Secretary of the Interior determined that the conditions of the Act were not being "reasonably" complied with and carried out

by the grantee" and on or about August 24, 1935, notified the City that its disposal of electric energy generated at Hetch Hetchy was in violation of the provisions of the Act quoted in Finding IV. Finally, more than 18 months later and on March 30, 1937, the City stated that it would continue such disposal until after court action. Thereupon the said Secretary of the Interior, on April 2, 1937, in accordance with the provisions of the Raker Act, requested the Attorney General in the name of the United States to commence suit for the purpose of enforcing and [91] carrying out the provisions of that Act.

XIII.

The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it, and unless restrained will continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract.

Conclusions of Law

From the foregoing Findings of *Act*, the Court reaches the following conclusions of law:

I.

The contract to sell, and the sale of, electric energy by the City to the Company for resale is a selling or letting to said Company of the right to resell the same, prohibited by and in violation of,

the provisions of the Raker Act, prohibiting such selling or letting.

II.

The contract between the City and Company is a grant by the City to the Company of the right to sell electricity produced by the City at Hetch Hetchy, and its performance by the parties is a selling or letting to said Company of the right to resell the same all within the prohibition of Section 6 of the Raker Act and hence a violation of that statute. [92]

III.

The provisions of Section 6 of the Raker Act are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety. Enforcement of the express terms of the statute is not subject to estoppel or other equitable defense.

The motion of the United States to strike evidence of the City relating to these defenses must be granted and the motion of the City to reopen the case for the introduction of similar evidence must be denied.

IV.

The United States has no plain, speedy or adequate remedy at law.

V.

The United States is entitled to an injunction perpetually restraining the defendant, the City and County of San Francisco, from its present disposal

of said energy, or from any disposal thereof whereby the right to resell such energy is let or sold to any private corporation or individual and in default thereof enjoining and restraining the defendant from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy for such disposal.

Done in Open Court this ..... day of May, 1938.

.....

United States District Judge. [93]

Service of the above and receipt of copy thereof acknowledged this 18th day of May, 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
of Counsel
Attorneys for Defendant

Approved as to Form this 18th day of May, 1938, as provided by Rule 22:

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Attorneys for Defendant.

[Endorsed]: Lodged May 19, 1938. [94]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED AMENDMENTS AND ADDITIONS TO "FINDINGS OF FACT AND CONCLUSIONS OF LAW" PROPOSED BY PLAINTIFF AND SERVED MAY 19, 1938.

The defendant in the above entitled cause, (a) in accordance with Rule 42 of this Court, proposes each of the following amendments and additions to the "Findings of Fact and Conclusions of Law" in said cause proposed by plaintiff herein, and served upon said defendant on May 19, 1938, and (b) requests a hearing by the Court with respect to said proposed amendments and additions to said proposed Findings.

1. On page 2, line 30 of said proposed Findings, strike out the words: "And low rate electricity".

2. On page 3, line 2, after the words "its lands" insert the words: "therein described". [95]

3. On page 3, line 7 of said proposed Findings, after the word "generated", insert the following:

> "The location and extent of the lands and rights of way so granted to defendant under said Raker Act are correctly shown on 'Defendant's Exhibit A' in evidence herein".

4. On page 3, lines 15-16 of said proposed Findings, strike out the words: "and acquiesced in, and became bound by the terms and conditions thereof".

5. Page 3, lines 19 to 22, of said proposed Findings, strike out the words:

"To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant".

and commence the following word "it" with a capital.

6. On page 3, line 27 of said proposed Findings, after Finding "IV" insert the following:

"IV A

Among the provisions of said Raker Act were the following appearing in Section 9 thereof:

'(b) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as

will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage [96] or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(c) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy as follows: The said grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the

works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(d) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interests demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of [97] such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower: and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the develop-

ment, transmission, use, and sale of such power.

(e) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee".

7. On page 4, line 1 of said proposed Findings, add the following:

"in connection with the utilization of lands, rights and privileges owned by the City and acquired by it from other sources".

8. On page 4, line 5 of said proposed Findings, after the word "United States" insert: "under the Raker Act".

9. On page 4, line 6 of said proposed Findings strike out the word "it", and in lieu thereof insert the words: "said project".

10. On page 4, lines 7 and 8 of said proposed Findings, insert the word "so" before the word "acquired" on line 8, and strike out the balance of the sentence.

11. On page 4, line 9 of said proposed Findings, insert a new paragraph to be numbered "VI A" which shall read as follows:

"VI A

In conformity with the provisions of said Raker Act, and prior to July 1, 1925, the defendant had expended over $43,000,000.00 in the construction of dams, aqueducts, and works, designed to store and deliver a municipal water supply to its inhabitants, had built the Early Intake power house, primarily for the supply of power for con- [98] struction purposes on the project, and had completed the Moccasin power house capable of generating 80,000 horsepower of hydroelectric energy, and a transmission line adequate to transmit said energy to Newark in Alameda County; the defendant had not acquired and never has been financially able to acquire any distribution system in the City and County of San Francisco or elsewhere for the distribution of such electric energy to consumers; the Company and Great Western Power Company (later consolidated with the Company) were at that time the only distributing companies owning electric distribution systems in San Francisco, and

each of them declined to sell or lease its distribution system to the defendant for the purpose of enabling it to distribute thereby to its inhabitants the electric energy generated by it in connection with its said Hetch Hetchy project."

12. On page 4, line 25 of said proposed Findings, after the words "United States", insert the following:

"in connection with lands, water rights, easements and privileges owned by the City and acquired by it from other sources,"

13. On page 4, line 28 of said proposed Findings, after the figures "1925" insert the following:

"There never has been and there is not any contract or arrangement between the City and the Company with respect to the delivery and/or distribution of said electric energy, other than said contract of July 1, 1925".

14. On page 4, line 29 of said proposed Findings, after the words: "Hetch Hetchy" insert the following:

"About 3 per cent. of the energy so generated and transmitted is produced in a power plant known as the Early Intake power plant, which is situate on lands granted to the City under the terms of said Raker Act; that the remaining 97 per cent. of said energy is generated in the Moccasin Creek power plant, which is situ-

ated entirely on patented land owned by the City, and that the electric energy generated therein, together with the surplus energy from the Early Intake plant, is transmitted from Moccasin power plant to Newark in Alameda County, over lands owned by the City and not acquired by it under the terms of the Raker Act; the only use made by the City of rights granted to it under the Raker Act in connection with said Moccasin Creek plant is the storage of water in the Hetch Hetchy Valley and at Lake Eleanor, partially on lands granted under the Raker Act, and the transmission of said water through tunnel aqueducts and canals partially on lands granted under the Raker Act; the primary purpose of said reservoirs and aqueducts is to transmit [99] water to San Francisco for municipal water supply purposes; said water would be so transmitted whether the Moccasin Creek power plant, which is on the line of the water conduit, were operated or not".

15. On page 5, strike out lines 3 and 4 of said proposed Findings, and in lieu thereof insert the following:

"In carrying out said contract of July 1, 1925, the City and the Company have proceeded as follows:"

16. On page 5, line 7 of said proposed Findings, insert before the word "Determination" the words:

"Subject to the provisions of said contract", and change the "D" in "Determination" to a small letter.

17. On page 5, line 14 of said proposed Findings, insert after the word "disposition", the words:

"but in a physical sense only and subject to the provisions of said contract of July 1, 1925".

18. On page 5, line 16 of said proposed Findings, strike out the words: "it is provided that from" and in lieu thereof insert the words:

"the parties to said contract deducted"

19. On page 5, lines 17 and 18 of said proposed Findings, strike out the words: "shall be deducted" and in lieu thereof insert the word: "thereof".

20. On page 5, lines 19 and 20 of said proposed Findings, strike out the words: "of receipt" which are repetitions.

21. On page 5, lines 21 to 25 of said proposed Findings, strike out the sentence commencing with the words: "Deduction of 24 per cent" and ending with the words: "for such energy".

22. On page 6, line 14 of said proposed Findings, strike out the words: "under the contract" and insert the word "exact" at the end of said line.

23. On page 6, line 16 of said proposed Findings, after the word "consumers" insert the following: [100]

"to the extent that payments made to the City are computed in accordance with the formula prescribed in said contract, and have not taken

into account changes made by the Railroad Commission of California in each of the years 1935, 1936 and 1937, in respect of the rates chargeable to consumers".

24. On page 6, between lines 16 and 17 of said proposed Findings, insert three new paragraphs to be numbered "3a", "3b" and "3c", which shall read as follows:

"3a. In and by said contract of July 1, 1925, it is provided that the rates at which the electric energy delivered by the City to the Company under said contract shall be sold to consumers in the City and County of San Francisco, shall be those fixed by the Railroad Commission of the State of California; said rates are the rates which at all times since July 1, 1925 have been and are now operative and binding upon the Company with respect to all electric energy generated by it which it sells in said City and County of San Francisco; said rates were adopted by the City and the Company in and by said contract of July 1, 1925, as the rates which should be charged to consumers of the electric energy generated by the City and delivered by it to the Company for transmission and distribution, as provided in said contract, for the reason that it would be impractical to charge consumers of electric energy generated by the Company at one rate, and to charge consumers of the electric energy generated by the City at a different rate;

3b. Since the execution of said contract of July 1, 1925, the City has received and is still receiving for the electric energy delivered by it to the Company the percentage of the average rate paid to the Company by consumers in the City and County of San Francisco, which in and by said contract it is provided that it shall receive; said average rate as fixed by said contract has remained constant, however, and has not been varied to conform to the rates fixed by the Railroad Commission of California in the years since the execution of said contract; as the result of the failure to vary said average rate of return to conform to the rates fixed by said Railroad Commission, the City has received from the Company $25,000.00 more than it would have received if said return had varied in conformity with the rates fixed by said Railroad Commission as by said contract it is provided that said return should vary;

3c. The net revenue to the City from the disposition and distribution of the electric energy generated by it, in accordance with the aforesaid contract of July 1, 1925, between the City and the Company, is and at all times has been approximately $2,200,000.00 per year."

25. On page 6, lines 25 to 28, inclusive, of said proposed Find- [101] ings, strike out the sentence commencing with the words: "The City is assured" and ending with the words: "its acceptance or use".

26. On page 6, lines 30 and 31 of said proposed

Findings, after the words: "are fixed", strike out the words: "not by the City but by the State Railroad Commission", and in lieu thereof insert the following:

"not by the Railroad Commission of California, but by the City, which, however, adopts the rates prescribed by said Railroad Commission of California, as the rates which may be charged by private utility corporations to consumers of electric energy".

27. On page 7, lines 4 to 6 of said proposed Findings, strike out all of the paragraph numbered 6 and in lieu thereof insert the following:

"6. Electric energy originating at Hetch Hetchy is distributed by the Company, in the normal course of its business, to the persons, firms and corporations who, are customers therefor at the time of distribution".

28. On page 7, lines 14 to 17 of said proposed Findings, strike out all of paragraph "9" and in lieu thereof insert the following:

"Except as next stated, the Company makes no accounting to the City of its sales of electricity to consumers. The amount of electricity delivered to the Company by the City at Newark is determined by joint meter readings at Newark, and the formulae specified in the contract of July 1, 1925, are applied to said quantity and the City merely bills the Company for said quantity in accordance with said formulae".

29. On page 7, lines 21 and 22 of said proposed Findings, strike out the words: "for sale of Hetch Hetchy power to the Company by the City", and in lieu thereof insert the following:

"of July 1, 1925. The power so purchased by the City from the Company, however, has different characteristics from that delivered by the City to the Company at Newark; after receiving the energy at Newark the Company steps down the voltage of said energy and regulates it through transformers and condensors; for municipal railway use, it converts a large part of the current from alternating current with a 60 cycle frequency [102] to direct current having no frequency, radically changes the load factor, and, by its standby service, protects the City's requirements for electric energy for the various purposes for which it is used by the City".

30. On page 7, line 25 of said proposed Findings, after the word: "cancellation" insert the words: "by the parties".

31. On page 7 of said proposed Findings, strike out all of paragraph "X" from the "Findings of Fact", because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the "Conclusions of Law", if the subject matter is to be, at all, included in the "Findings of Fact and Conclusions of Law", in said cause.

32. On page 8 of said proposed Findings, strike out all of paragraph "XI" from the "Findings of Fact", because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the "Conclusions of Law", if the subject matter thereof is to be, at all, included in the "Findings of Fact and Conclusions of Law", in said cause.

33. On page 8, line 16 of said proposed Findings, change the figure "XII" to "X".

34. On page 9 of said proposed Findings, strike out the figure "XIII" and all of the paragraph of that number, and in lieu thereof insert the following:

"XI.

Unless restrained by this Court, the City will continue to dispose of the electric energy generated by it at Hetch Hetchy in the manner hereinbefore stated".

35. On page 9, line 10 of said proposed Findings, insert four new paragraphs to be numbered: "XII", "XIII", "XIV" and "XV", which shall read, respectively, as follows: [103]

"XII.

The manner of disposition and distribution by the City of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with the aforesaid contract of July 1, 1925, ('United States Exhibit 6'), has not, at any time, damaged, and does not dam-

age, the plaintiff in any respect or to any extent or in any amount;

XIII.

If the City shall be prevented from disposing of the electric energy generated by it in connection with its Hetch Hetchy project, as provided in said contract of July 1, 1925 ('United States Exhibit 6'), or in some other manner by which it shall be permitted to use the transmission and distribution facilities of a private corporation for such purpose, it will suffer a loss of approximately $2,200,000.00 per year and will be damaged in that amount and to that extent.

XIV.

Any sudden disruption of operations under said contract of July 1, 1925, ('United States Exhibit 6') or any sudden cessation of the disposal and distribution of the electric energy generated by the City at its above mentioned power plants in connection with the so-called Hetch Hetchy water project, in the manner provided in said contract, would result in serious economic waste; for said reason, the City should be allowed a reasonable period within which to provide a mode of disposing of and distributing said electric energy, which will not violate the provisions of the Raker Act; a reasonable period to allow the City for said purpose is one year, to commence on the day when

the decree herein shall become final; the injunction to be issued herein should not be issued prior to the expiration of said period.

XV.

It is appropriate that the Court reserve jurisdiction of the cause for the purpose of modifying its Decree to be entered herein, so as to permit the City to transmit and distribute the electric energy generated by it in connection with its said Hetch Hetchy project, either by contract with a private corporation, or otherwise, in a manner which will not constitute a violation of the Raker Act".

36. On page 9, lines 18 to 22, inclusive, of said proposed Findings, strike out the first of the "Conclusions of Law" and in lieu thereof insert the following:

"The contract of July 1, 1925 is a contract to sell [94] for resale the electric energy generated by the City at Hetch Hetchy; said contract contemplates a sale of electric energy thereunder, includes a sale to the Company by the City of the right to resell the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark; said contract is prohibited by and is in violation of the provisions of the Raker Act prohibiting such sale".

37. On page 9, strike out the second of the "Conclusions of Law" and in lieu thereof insert the following:

"The contract between the City and the Company is a grant by the City to the Company of the right to sell the electric energy generated by the City at Hetch Hetchy and is a selling to the Company of the right to sell said electric energy in violation of the prohibition of Section 6 of the Raker Act".

38. On page 10, lines 9 to 12: Strike out the sentence within these lines commencing with the words: "The motion of the United States" and ending with the words: "must be denied", because the orders relating to the motions mentioned are intermediate orders, unrelated to the decision of the cases and have no place in the Findings of Fact or Conclusions of Law.

39. On page 10, line 19, before the words: "United States", insert the following:

"Subject to the provisions of the next succeeding paragraph 'VI' hereof,"

40. On page 10, line 28, insert the following:

"The United States is entitled to a decree which shall order, adjudge and decree as follows:

(1) That one (1) year after this Decree shall have become final, either through the lapse of the time limited for an appeal therefrom without any appeal having been taken, or through the affirmance by the Court, which shall have finally disposed of any appeal taken therefrom, the Clerk of this Court issue out of

this Court and under the seal thereof, a Writ of Injunction directed to the defendant and enjoining and restraining it from distributing or otherwise disposing of the electric energy generated by it at Moccasin Creek Power House and/or Early Intake Power House in connection or in conjunc- [105] tion with its so-called Hetch Hetchy Water project, in the manner provided in said contract of July 1, 1925, ('United States Exhibit 6'), and directing that unless it shall cease from distributing or otherwise disposing of said electric energy in the manner provided in said last mentioned contract, it be enjoined and restrained from using for the generation and transmission of said electric energy, any of the rights granted to it in and by the Statute of the United States, approved December 19, 1913 (38 Stats. at L. 241) commonly known as and called the Raker Act.

(2) That each of the parties hereto bear and pay its costs of suit herein.

(3) That the defendant shall have the right to submit to the Court at any time any plan, contract or arrangement for the transmission, distribution and disposal of the electric energy generated by it in connection with its Hetch Hetchy project which, in its opinion, does not constitute a violation of the provisions of said Raker Act, and to apply to the Court at the foot of the decree for a modification of said de-

cree and of the injunction thereby directed to issue, which will permit it to transmit, distribute and dispose of said electric energy in accordance with such plan, contract or arrangement, and the Court hereby retains jurisdiction of the cause for the purpose of entertaining such application, if any be made, and of granting the same if, upon the proof offered in support thereof, it shall seem proper so to do.''

By proposing the foregoing Amendments and Additions to said "Findings of Fact and Conclusions of Law" served May 19, 1938, as aforesaid, the defendant (1) does not concede or admit that the Findings of Fact and Conclusions of Law so proposed to be modified by said proposed amendments and additions, would be a proper Finding of Fact and/or Conclusion of Law to be made by this Court in said cause, if modified as proposed; (2) does not waive its right to object to any of said Findings of Fact and Conclusions of Law, as modified, if the proposed modification thereof, be allowed and adopted; and (3) does not concede, but, on the contrary, denies that any of the so-called Findings of Fact contained in paragraph IX of said proposed "Findings of Fact and Conclusions of Law", so served on May 19, 1938, or any of the other so-called Findings of Fact contained in said proposed "Findings of Fact and Conclusions of Law", so served May 19, 1938, [106] which purports to construe the meaning or effect of the aforesaid contract

between the City and the Company dated July 1, 1925, is a proper subject matter of a finding of fact.

Dated: June 1, 1938.

Respectfully submitted,
JNO. J. O'TOOLE
DION R. HOLM
Attorneys for Defendant.

ROBERT M. SEARLS
Of Counsel for Defendant.

Due service of the foregoing Amendments and Additions proposed by the defendant to the Draft of Findings of Fact and Conclusions of Law in the above cause, proposed by the Plaintiff, is hereby acknowledged this 1st day of June, 1938.

FRANK J. HENNESSY
W. E. LICKING
Attorneys for Plaintiff.

[Endorsed]: Lodged May 31, 1938. [107]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause came on regularly for trial in the above entitled court, Honorable Michael J. Roche, Judge of said court presiding, on October 19, 1937, the plaintiff United States of America being represented by its attorneys Frank J. Hennessy, United States Attorney for the Northern District

of California, W. E. Licking, Assistant United States Attorney, and Frederic L. Kirgis; the defendant City and County of San Francisco being represented by John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Robert M. Searles; whereupon evidence both [108] oral and documentary on behalf of the parties was offered and received and the cause regularly continued to October 21, 1937, at which time leave was granted the parties to file briefs, and said briefs having been filed and the matter argued orally by the parties on March twenty-first and twenty-second, 1938, and the case having been submitted to the court for its decision on the latter date; the court having duly considered the evidence and the briefs and arguments of counsel and having on April 11th rendered its decision herein in favor of plaintiff together with its written opinion in support thereof, and being fully advised in the premises, now makes the following special findings of fact and reaches the following conclusions of law:

Findings of Fact.

I.

The defendant City and County of San Francisco, hereinafter referred to as the City, is a municipal corporation of the State of California. The Pacific Gas & Electric Company, hereinafter referred to as the Company, is a private California corporation, engaged in the business of distribution and sale of

electric energy in the City and County of San Francisco and elsewhere.

II.

For a number of years prior to December 19, 1913, the City had been seeking to assure itself of adequate water by a plan known as the Hetch Hetchy project. By the terms of the Raker Act of December 19, 1913 (38 Stat. 242) the United States, acting through the Congress granted to the City lands and certain rights and privileges in its lands therein described; among the rights and privileges so granted was [109] the right to utilize the granted lands and their appurtenant resources for the development of electric energy, including the storage and transmission of water necessary for the generation of electric energy and the transmission of electricity generated.

The grant so made by the United States was conditional upon the acceptance by the City of the terms and conditions therein specified.

III.

Thereafter, the City of San Francisco, through an ordinance passed by its Board of Supervisors and approved by its Mayor, January 13, 1914, did accept said grants contained in the Raker Act and acquiesce in the terms and conditions thereof.

IV.

To insure the direct distribution of water and electricity by the City, and to prevent enjoyment

by private corporations of any profits from the Government grant, it was provided in the Raker Act:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it by the said grantee."

V.

Prior to July 1, 1925 the City had entered into the use and enjoyment of the lands, rights and privileges granted by the Raker Act and was then, and is now, generating and [110] transmitting electric energy through its utilization thereof.

VI.

The lands and rights acquired by the City from the United States under the Raker Act are indispensable to the operation of the City's Hetch Hetchy project, although said project includes lands and rights other than those so acquired from the United States.

VII.

On July 1, 1925 the City entered into a contract with the Company for the distribution and sale of electric energy generated by the City at its Moccasin Creek Power Plant, part of the so-called Hetch Hetchy project. A true and correct copy of the contract is filed with the City's answer, marked

"Exhibit A" thereof, and is made a part of this finding by reference.

VIII.

Since July 1, 1925, electric energy originating at the Moccasin Creek Power Plant of the City, and since late in 1935, the electric energy originating at the City's Early Intake plant, all generated and transmitted through utilization of the lands, rights and privileges granted to the City by the United States, has been, and is now being delivered to the Company under the terms of the contract executed between the City and the Company on July 1, 1925. Electric energy generated at both plants is hereinafter referred to as that originating at Hetch Hetchy. [111]

IX.

Under the contract, by its terms, and as shown by the activities of the contracting parties thereunder:

1. Power developed by the City at Hetch Hetchy is delivered to the Company at its Newark substation, 35 miles south east of San Francisco. Determination of how much electricity shall be accepted at any given time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants. From the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark the City is without power over, and the Company has exclusive and entire control of, its disposition.

2. In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of the energy from the City by the Company at Newark and delivery to the ultimate consumers. Deduction of 24 per cent of the Hetch Hetchy energy delivered by the City to the Company at Newark is a necessary factor in the formula for ascertainment of the amount to be paid by the Company to the City as a fair price for such energy.

3. By the terms of the contract the Company is required to "account for and pay over to the City for the energy so consigned and delivered to it by the City at Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour, (the average revenue received by the Company in 1924) for 76 per cent of the energy so consigned [112] and delivered by the City to it at Newark. And the Company shall retain * * * 73.065 per cent as its compensation for services rendered under this contract." The proportional percentages—26.935 and 73.065—were to remain fixed during the life of the contract between the City and the Company. As rates varied, amounts of payments to the City were to be adjusted accordingly.

In actual practice the amount per unit received by the City for its electric energy delivered under

the contract has remained constant, despite several reductions in the rates charged by the Company and appreciable fluctuation in the average amount per unit received by the Company from its sale. The price which the City receives for its energy under the contract is in practice fixed and without direct relation to the actual revenue received from its sale to consumers.

4. With exceptions here immaterial the Company accepts at Newark the entire output of energy from Hetch Hetchy at not to exceed a 75 per cent monthly load factor. Monthly payments by the Company to the City are based upon the amount of energy actually delivered into the Company's system at Newark, or, in event of failure of the Company to take the available output of the City's plant deliverable at Newark under the contract, upon the amount which the City could have delivered at a 75 per cent load factor. The City is assured of payment and the Company is under an absolute duty to pay for the amount of electric energy specified without regard to its acceptance or use.

5. The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission. Under the State Constitution, municipalities are not subject to commission regula- [113] tion, and as a principal the City has power thereunder to fix rates for electric energy produced by it, and sold by an agent, if there be an agent.

6. Electric energy originating at Hetch Hetchy

is disposed of by the Company to its usual customers in the normal course of its retail trade.

7. The Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy including that originating at Hetch Hetchy.

8. Moneys collected by the Company from consumers of power are in no way, arbitrarily or otherwise, segregated or apportioned with regard to the portion thereof deemed attributable to power produced at Hetch Hetchy.

9. To the City the Company makes no accounting of its sales of electricity to consumers. Accounting between the two is limited to monthly statements by the City to the Company for electricity delivered at Newark.

10. The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City.

11. The contract is terminable by either the City or the Company upon one day's notice; and is by its terms subject to cancellation by the parties upon request of the Secretary of the Interior should he determine the agreement to be violative of any section of the Raker Act.

X.

The contract between the City and the Company is a contract to sell for resale, and the disposal of electric [114] energy thereunder by the City to

the Company constitutes a sale for resale of, electric energy generated by the City at Hetch Hetchy. The contract to sell contemplates, and the sale of energy thereunder includes, a sale and letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark

XI.

The Secretary of the Interior is designated by the Raker Act to safeguard the interest of the United States in its grant. Pursuant to such duty imposed by the Act, the Secretary of the Interior determined that the conditions of the Act were not being "reasonably complied with and carried out by the grantee" and on or about August 24, 1935, notified the City that its disposal of electric energy generated at Hetch Hetchy was in violation of the provisions of the Act quoted in Finding IV. Finally, more than eighteen months later and on March 30, 1937, the City stated that it would continue such disposal until after court action. Thereupon the said Secretary of the Interior, on April 2, 1937, in accordance with the provisions of the Raker Act, requested the Attorney General in the name of the United States to commence suit for the purpose of enforcing and carrying out the provisions of that Act.

XII.

The City is now selling or letting to the Company, the right to sell or sublet the electric energy gen-

erated [115] at Hetch Hetchy and delivered by the City to it, and unless restrained will continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract.

Conclusions of Law.

From the foregoing Findings of Fact, the Court reaches the following conclusions of law:

I.

The hereinbefore described disposal by the City to the Company of electric energy includes a selling and letting by the City to the Company of the right to sell or sublet such energy and is within the prohibition of Section Six of the Raker Act; and any disposal of such energy by the City whereby the right to sell or sublet the same is sold or let to any individual or corporation except a municipality or a municipal water district or irrigation district will likewise violate such provision.

II.

The provisions of Section 6 of the Raker Act are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety. Enforcement of the express terms of the statute is not subject to estoppel or other equitable defense. [116]

III.

The United States has no plain, speedy or adequate remedy at law.

IV.

The United States is entitled to an injunction effective six months from the entry of the Decree herein perpetually restraining the defendant, the City and County of San Francisco, from its present disposal of said energy, or from any disposal thereof whereby the right to resell such energy is let or sold to any private corporation or individual, and in default thereof enjoining and restraining the defendant from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy for such disposal.

V.

That it is appropriate that this court reserve and retain jurisdiction of this cause for the purpose of permitting either party, upon proper notice and on such proof as the Court may require, to apply to the Court at the foot of the Decree for a modification or suspension of the provisions of the injunction issued pursuant to said Decree.

Done in Open Court this 24th day of June, 1938.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed: Filed June 24, 1938.] [117]

In the Southern Division of the United States District Court for the Northern District of California.

In Equity No. 4173-R.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Defendant.

FINAL DECREE AND ORDER FOR WRIT OF INJUNCTION.

This cause came on to be further considered at this term and was briefed and argued by counsel for the respective parties and thereupon on consideration thereof it is this day hereby

Ordered, Adjudged and Decreed as follows, viz:

(1) That the defendant's present disposal to the Pacific Gas and Electric Company of the electric energy generated and transmitted by the defendant through its utilization of the lands, rights and privileges granted it by the plaintiff through the terms of the Raker Act (38 Stats. at Large 242) is a violation of the provisions of Section 6 of that Act prohibiting the sale [118] or letting of the right to sell such energy, and that any disposal by the defendant of said energy whereby the right to

sell or sublet the same is sold or sublet to any private corporation or individual will likewise violate the same provision; and

(2) On and after December 28th, 1938, the defendant, the City and County of San Francisco, its officers, agents, servants and employees, and their successors and other persons assuming to act under its authority, be, and they are hereby enjoined from the disposal of such electric energy to the Pacific Gas and Electric Company pursuant to the terms of the contract between defendant and said Company dated July 1, 1925, or in the manner therein provided, and from any disposal thereof whereby there is sold, given, let to, or otherwise vested in the Pacific Gas and Electric Company or any individual or corporation, other than a municipality or municipal water district or irrigation district, the right to sell or sublet such electric energy; and

(3) If defendant shall fail to comply with Paragraph (2) of this decree, it shall be and hereby is enjoined and restrained from using for development and transmission of electric energy any of the lands, rights and privileges granted to it by plaintiff by the said Raker Act.

(4) The Court hereby reserves and retains jurisdiction of this cause for the purpose of permitting either party, upon due notice and such proof as the court may require, to apply to the court at the foot of the decree for a modification or suspension of the injunction hereinabove ordered. [119]

It Is Further Adjudged and Decreed that each party bear its own costs.

Dated: This 28th day of June, 1938.

MICHAEL J. ROCHE
United States District Judge.

Service of the above and receipt of copy thereof acknowledged this 24th day of June 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant.

Approved as to form this 24th day of June 1938, as provided by Rule 22:

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant.
FRANK J. HENNESSY
United States Attorney.
W. E. LICKING
Assistant United States Attorney.
Attorneys for Plaintiff.

[Endorsed]: Filed and Entered June 28, 1938.

[120]

[Title of District Court and Cause.]

PETITION OF DEFENDANT FOR REHEARING.

To the Honorable, the Above Entitled Court:

The defendant in the above entitled cause hereby respectfully prays for a rehearing of said cause,

and represents and urges the following, in support of its said prayer and as the grounds for justifying and requiring the granting of the same:

1. That the evidence in said cause was and is insufficient to justify any of the findings of fact adverse to the defendant which are included in the Opinion of the Court filed herein April 11, 1938;

2. That the evidence in said cause was and is insufficient to justify any of the conclusions of law adverse to said defendant which are included in the Opinion of the Court filed herein April 11, 1938;

[121]

3. That the evidence in said cause was and is insufficient to justify any of the findings of fact adverse to the defendant which are included in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause on June 24, 1938;

4. That the evidence in said cause was and is insufficient to justify any of the Conclusions of Law adverse to the defendant which are included in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause on June 24, 1938;

5. That the evidence in said cause was and is insufficient to justify the decree made, filed and entered in said cause, on June 28th, 1938;

6. That the Court erred in each of its rulings on the admission of evidence, on the hearing of said cause, to which the defendant duly excepted, as shown by the Reporter's Transcript of the evidence offered and received and the proceedings had and taken on said hearing; said Reporter's Transcript is, by reference, incorporated herein, and made a part hereof;

7. That the Court erred in its rulings on the hearing of said cause and in its Opinion and its Findings of Fact and Conclusions of Law therein by which it held and decided that the provisions of Section 6 of the Raker Act were adopted by the Congress of the United States as part of a valid statute and in the exercise of the legislative power of the Congress over public lands of the United States, and that said provisions have the force and effect of law and not merely of covenants or contract restrictions upon the use of property;

8. That the Court erred in its rulings on the hearing of said cause and in its Opinion and its Findings of Fact and Conclusions of Law therein by which it held and decided that the right of the United States to enforce the provisions of Section 6 of the Raker Act was not dependent upon or subject to any rule of estoppel or any other equit- [122] able defense.

9. That the Court erred in its rulings on the hearing of said cause and in its Opinion and its Findings of Fact and Conclusions of Law therein whereby it held and decided that the determination of the question whether the United States was entitled to an injunction in said cause because of the alleged violation by the defendant of the provisions of Section 6 of the Raker Act was not dependent upon and could not be influenced by any consideration of the relative equities of the respective parties, and that, in the determination of said question, no consideration should be given as to whether or not

the equities of the defendant outweighed and outbalanced the equities of the plaintiff;

10. That the Court erred in its rulings made in its Opinion filed April 11, 1938, by which it granted the plaintiff's motion to strike out certain evidence offered by the defendant upon the hearing of the cause, and then admitted; the evidence so stricken out is shown by the Reporter's Transcript of the Evidence offered and received and the proceedings had and taken on said hearing which, by reference, is incorporated herein, and made a part hereof;

11. That the Court erred in the ruling made in its Opinion filed April 11, 1938, by which it denied defendant's motion to set aside the submission of said cause and permit the defendant to offer additional evidence therein;

12. That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that Section 6 of the so-called Raker Act (38 Stats. 241) prohibits the distribution and/or disposal, in the manner provided in the agreement dated July 1, 1925 ("Exhibit A" to the defendant's answer herein) between the defendant and Pacific Gas & Electric Company (hereinafter called the "Company"), of the electric energy gen- [123] erated and/or transmitted wholly or partly by or through the exercise of rights or privileges granted to the defendant by said Raker Act;

13. That the Court erred in holding and deciding in its Opinion in said cause and in its Find-

ings of Fact and Conclusions of Law therein, and in its Decree, that said agreement dated July 1, 1925 is not a contract of agency, and that, in rendering the services which it renders, under and in accordance with said agreement, the Company does not act as agent for the defendant and/or for its account;

14. That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that said agreement of July 1, 1925, is a contract for the sale to the Company, for resale by it to ultimate consumers, of the electric energy which is the subject matter of said agreement;

15. That the Court erred in holding and deciding in its Opinion in said cause, and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that said agreement of July 1, 1925, is a contract whereby the defendant sells or lets to the Company the right to resell or sublet the electric energy which is the subject matter of said agreement;

16(a). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that said agreement of July 1, 1925, vests in the load dispatcher of the Pacific Gas and Electric Company the right to determine how much electricity shall be accepted at any given time under said contract, and that from the time the electric energy originating at Hetch Hetchy enters the system of the Com-

pany at Newark the City is without any power over its disposition;

16(b). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law [124] therein, that the deduction of 24 per cent. of the Hetch Hetchy electric energy delivered by the City to the Pacific Gas and Electric Company at Newark under said contract of July 1, 1925, is only a necessary factor in the formula for ascertainment of a purchase price for such energy, and in failing to find that said percentage in fact represents the actual line losses incurred by the Pacific Gas and Electric Company in transmitting the said Hetch Hetchy energy from Newark to the consumers in San Francisco;

16(c). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that 73.065 per cent. of 2.383 cents per kilowatt hour which the Pacific Gas and Electric Company under said contract of July 1, 1925, is entitled to retain as its compensation for services rendered under this contract, is purely a percentage fixed by contract, and the Court erred in failing to hold that said 73.065 per cent. of 2.383 cents per kilowatt hour did not represent the actual expense of said Company incurred in distributing said electric energy at the time said contract was made, including a fair compensation for the use of the Company's distribution system in making such distribution.

The Court further erred in failing to hold that during the past ten years the total amount of money realized and received by the defendant under said contract of July 1, 1925, exceeded the amount which it would have received if the average return of the Pacific Gas and Electric Company for the sale of said energy under every change in rates which took place was not in excess of $25,000 out of a total compensation received by the defendant of over $22,000,000, and that said difference therefore constituted an immaterial departure from the strict terms of the contract;

16(d). That the Court erred in not holding that the entire output of electric energy from Hetch Hetchy delivered at San Francisco on a [125] 75 per cent. monthly load factor is less than the total amount of electric energy necessary each month in San Francisco to meet the consumptive demand in said City and County for electric energy, and in not holding and finding that a market existed in the City and County of San Francisco for all of the electric energy which the defendant was able to deliver from Hetch Hetchy, and that hence the obligation of the Pacific Gas and Electric Company to take delivery of and distribute said total output from defendant's plants on a 75 per cent. monthly load factor did not constitute an obligation to take any energy for which a ready market in San Francisco did not in fact exist;

16(e). That the Court erred in holding and deciding in its Opinion in said cause and in its Find-

ings of Fact and Conclusions of Law therein, that the rates charged to the consumers of electric energy originating at Hetch Hetchy are not fixed by the City, and in failing to hold that under the terms of said contract the City expressly required that the said electric energy be sold at rates to be fixed by the State Railroad Commission, and that the City had a right to make such a requirement under the laws of the State of California and exercise the same;

16(f). That the Court erred in failing to hold and decide in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that the usual customers of the Pacific Gas and Electric Company to whom said electric energy originated at Hetch Hetchy was disposed of by said Company were not also in fact the customers of the defendant by reason of the terms of said contract of July 1, 1925;

16(g). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that the fact that the Pacific Gas and Electric Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy, including that originating at Hetch Het-
[126] chy, and that moneys collected by the Company from consumers were not segregated in its accounts so as to show the portion thereof deemed attributable to power produced at Hetch Hetchy, was of any significance in determining the character

of said contract of July 1, 1925, as an agency contract or a sales contract;

16(h). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that the fact that the monthly accounting between the defendant and the Pacific Gas and Electric Company was limited to monthly statements by the defendant to said Company for electricity delivered at Newark, is of any significance in determining the character of said contract of July 1, 1925, as an agency contract or a sales contract;

16(j). That the Court erred in failing to hold or decide in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that although the City itself is a purchaser from the Company of power, part of which originates at Hetch Hetchy, the characteristics of electric energy delivered to the City by the Company in San Francisco, both as to voltage, frequency and other characteristics, are radically different from the corresponding characteristics of said electric energy when delivered to the said Company by the City at Newark, and that therefore a separate accounting for such energy delivered to the City by the Company in San Francisco was and is necessary;

17. That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, and decreeing in its Decree, that the defendant should be enjoined from further transmitting, distributing

and disposing in the manner provided in said agreement of July 1, 1925, between it and the Company, of the electric energy generated by the defendant;

18. That the Court erred in holding and deciding (in effect), in [127] its Opinion in said cause, and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that the provisions of Section 6 of said Raker Act are conditions subsequent, a violation of which by the grantee (defendant herein), entails or justifies a forfeiture of the rights and privileges granted the defendant by said Raker Act;

19. That the Court erred in holding and deciding in its Opinion in said cause, and in its Findings of Fact and Conclusions of Law therein and in decreeing in its Decree that unless the City desisted from distributing and disposing, in accordance with said agreement of July 1, 1925, between it and the Company, of the electric energy generated by the City, it should be enjoined from using any of the rights and privileges granted to it by the Raker Act, in making distribution and disposal of said electric energy, in accordance with said agreement;

20. That the Court erred in holding and deciding in its Opinion, in said cause, and in its Findings of Fact and Conclusions of Law and in its Decree, and decreeing in its Decree, that injunctive relief should be awarded to the plaintiff, notwithstanding, that it has not suffered and will not suffer any damage whatsoever from the alleged violations of the provisions of the Raker Act claimed to have been

committed by the defendant, and notwithstanding that the defendant, through the operation of such injunction, will suffer damages in an amount exceeding $2,200,000.00 per year, so long as said injunction shall be and remain in force;

21. That the Court erred in holding and deciding in its Opinion in said cause, and in its Findings of Fact and Conclusions of Law, therein, and in decreeing in its Decree, that the injunctive relief ordered by it should be withheld for not more than six months after the date of its decree, and in denying defendant's request that it provide in its decree that an injunction should not issue until one year after the decree should become final. [128]

22. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the Raker Act were merely provisions in a contract between the plaintiff and the defendant, and as such were invalid and or unenforceable;

23. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the Raker Act were not within the law-making power of the Congress and that considered other than as provisions in a contract between the plaintiff and the defendant, the imposition of such prohibitions by the Congress would have been an unconstitutional invasion of the rights of the State of California, and of the defendant, City and County of San Francisco;

24. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the

Raker Act considered as provisions in a contract between the defendant and the plaintiff, were and are invalid and unenforceable because they imposed an unreasonable restraint of trade and an unreasonable restriction upon the power of alienation, particularly in so far as said restraint and restriction were imposed upon a public use;

25. That the Court erred in failing and refusing to find that the defendant had no authority to enter into a contract with the United States whereby it would limit its freedom in trading in or disposing of the electric energy generated by it in connection with its Hetch Hetchy project, and in failing and refusing to find that when the Raker Act was passed and the contract between the plaintiff and the defendant was made, the United States had notice of the City's lack of authority to enter into a contract which contained such prohibitions;

26. That the Court erred in failing and refusing to find that the invalidity of the prohibitions of Section 6 of the Raker Act would not and did not derogate from the grant made to the defendant by the Raker Act, or affect the rights and/or privileges granted to the def- [129] endant by said Act;

27. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the Raker Act were inserted for the benefit of the defendant and not for the benefit of the plaintiff, and that the plaintiff cannot rely upon or claim the benefit of such provisions, and is not entitled to enforce them by injunction;

28. That the Court erred in failing and refusing

to find that an injunction was not necessary for the protection of the plaintiff herein, and in failing and refusing to find that no benefit can accrue to the plaintiff from the issuance or the enforcement of an injunction;

29. That the Court erred in failing and refusing to find that the plaintiff would suffer no damage or injury from the denial of an injunction herein, and in failing and refusing to find that the defendant would suffer great damage and injury from the granting of an injunction.

Wherefore, for the reasons aforesaid, defendant prays that the Court require the plaintiff herein to answer this petition and to show cause why it should not be granted; that upon the hearing of this petition, the Court grant the same and order a rehearing of said cause; and that it grant to the defendant such other relief as may be proper and in accordance with the rules and usages of equity.

Dated: July 7th, 1938.

THE CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
defendant herein.

By JNO. J. O'TOOLE,
By DION R. HOLM,
By ROBERT M. SEARLS,
Its Attorneys.

JNO. J. O'TOOLE,
DION R. HOLM,
ROBERT M. SEARLS,
Attorneys for Defendant. [130]

State of California,
City and County of San Francisco.—ss.

John J. O'Toole, being first duly sworn, deposes as follows:

I am the City Attorney of the City and County of San Francisco, a municipal corporation, which is the defendant in the above entitled cause and the petitioner herein, and am one of the attorneys for said defendant and petitioner, and, as such, verify the foregoing petition on behalf of said defendant and petitioner. I have read said petition and know the contents thereof. Said petition is made and filed in good faith, and, in my opinion, the grounds upon which it is made are true in point of fact, and well taken in point of law.

JNO. J. O'TOOLE.

Subscribed and sworn to before me this 7th day of July, 1938.

J. L. PERUSIO,
Deputy County Clerk and Ex-Officio Deputy Clerk of the Superior Court of the State of California.

Rec'd copy of the foregoing petition this 8th day of July, 1938.

FRANK J. HENNESSY,
United States Atty.

[Endorsed]: Filed July 8, 1938. [131]

[Title of District Court and Cause.]

ORDER.

The defendant in the above entitled cause having this day filed herein its verified petition for rehearing of said cause, it is hereby ordered

1. That said petition be and the same is hereby entertained by the Court and reserved for further consideration and disposition at the hearing thereof, for which provision is hereinafter made;

2. That a copy of said petition and of this order be served upon the attorneys for the plaintiff in this cause within two (2) days from the date hereof; that (in accordance with Rule 44 of this Court) the plaintiff have (and it is hereby granted), ten (10) days from and after the service of said petition upon its attorneys within [132] which to serve and file its reply thereto; and that after the service and filing of plaintiff's reply to said petition, either party may call up said petition for hearing by the Court, upon not less than five (5) days' written notice to the other party;

3. That (in accordance with Rule 8 of this Court) the present term of this Court be and it is hereby extended for a period of three (3) calendar months commencing on June 28th, 1938 (said date being the date upon which the decree, herein, was entered), for the purpose of enabling the Court to hear, consider and pass upon said petition for rehearing.

Done in open Court this 8th day of July, 1938.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed July 8, 1938. [133]

[Title of District Court and Cause.]

NOTICE OF HEARING OF PETITION.

To the defendant above named, and to John J. O'Toole, Dion R. Holm, and Robert M. Searls, Esq., its attorneys:

You and each of you are hereby notified that on Monday, July 18, 1938, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above entitled Court, the undersigned as attorneys for the above named plaintiff will bring on for hearing the "Petition of Defendant for Rehearing," filed herein on July 7, 1938, together with the annexed Reply of Plaintiff thereto filed this date.

Dated: This 11th day of July, 1938.

FRANK J. HENNESSY,
United States Attorney

W. E. LICKING,
Assistant United States Attorney,
Attorneys for Plaintiff.

FREDERIC L. KURGIS
Of Counsel. [134]

[Title of District Court and Cause.]

REPLY TO PETITION FOR REHEARING.

Plaintiff in the above cause in reply to defendant's petition for rehearing on file herein respectfully urges the following grounds justifying and requiring a denial of the same:

I.

That the various specifications of error urged in support of said petition are, and each of them is, erroneous and ill-taken.

II.

That the matters of evidence now urged in support of said specifications were and each of them was fully presented to the Court at the trial of said cause. [135]

III.

That the points of law raised by said specifications were, and each of them was, urged and argued by defendant at the trial of said cause and were, and each of them was, duly considered by the Court and decided adversely to defendant's contentions.

Wherefore, for the reasons aforesaid plaintiff prays that the Court deny said petition.

Respectfully submitted this 11th day of July, 1928.

FRANK J. HENNESSY
United States Attorney
W. E. LICKING
Assistant United States Attorney
FREDERIC L. KURGIS.
Of Counsel
Attorneys for Plaintiff.

Service of the above and receipt of copy thereof acknowledged this 11th day of July, 1938.

JNO. J. O'TOOLE,
DION R. HOLM,
ROBERT SEARLS,
Attorneys for Defendant.

Approved as to form this.....day of July, 1938, as provided by Rule 22:

.....
Attorneys for Defendant.

.....
Frank J. Hennessy,
United States Attorney.

.....
W. E. Licking,
Assistant United States Attorney.

.....
Frederic L. Kurgis,
Of Counsel.
Attorneys for Plaintiff.

[Endorsed]: Filed July 11, 1938. [136]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 26th day of July, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Defendant's petition for rehearing came on to be heard. J. J. O'Toole and Robert M. Searls, Esqrs., appearing as attorneys for defendant and in support of said petition and Frank J. Hennessy, Esq., United States Attorney and Wm. E. Licking, Assistant United States Attorney, appearing on behalf of the plaintiff and in opposition thereto. After argument, it is Ordered that said petition for rehearing be and the same is hereby denied and that the defendant be allowed an exception to the ruling of the Court. [137]

[Title of District Court and Cause.]

ORDER ALLOWING TIME FOR FILING STATEMENT OF EVIDENCE.

Upon petition of defendant herein, It Is Hereby Ordered that it be allowed thirty (30) days from date hereof in which to prepare and lodge with the Clerk of the Court the statement of evidence required by Equity Rule No. 75 for use on appeal in the above entitled matter.

Dated: October 17, 1938.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Oct. 17, 1938. [138]

[Title of District Court and Cause.]

STATEMENT OF EVIDENCE.

The above entitled cause came on for final hearing before the above entitled Court, Hon. Michael J. Roche, presiding, on October 19, 1937. Frank J. Hennessy, Esq., United States District Attorney, William E. Licking, Esq., Assistant United States District Attorney, and Frederic L. Kirgis, Esq., First Assistant Solicitor of the Department of the Interior, appearing on behalf of the plaintiff; John J. O'Toole, Esq., City Attorney of San Francisco; Dion R. Holm, Esq., Assistant City Attorney, and Robert M. Searls, Esq., appeared on behalf of the defendant.

At the commencement of the hearing, Mr. Hennessy, counsel for the plaintiff, made an opening statement on behalf of the plaintiff, in the course of which, among other things, he said:

> "I have been authorized to state to the Court that the Government is not seeking in this case and will not offer any evidence upon the subject of damages; neither will we seek an accounting of the City and County of San Francisco of any profits that the City and County may have made through the diversion of the electric energy generated on the Hetch Hetchy project.
>
> The issue is a simple one. The question is, has the City and County of San Francisco violated the provisions of Section 6 of the Raker

Act. If the evidence shows a violation by the City and County of San Francisco of the provisions of Section 6 of the Raker Act, [139] the Government asks this Court to make a finding that this contract entered into on July 1, 1925 between the City and County of San Francisco and Pacific Gas & Electric Company is a contract of sale, and is violative of the provisions of Section 6 of the Raker Act, and enjoining the City and County of San Francisco from continuing to sell power for purposes of resale pursuant to the terms of that contract to the Pacific Gas & Electric Company, or to anybody else.

* * * * * * *

We are not seeking a forfeiture of the grant contained in the Raker Act. We are simply seeking an injunction restraining the violation by the City and County of San Francisco of Covenant 6 contained in the Raker Act.

* * * * * * *

On July 1, 1925 the City and County of San Francisco entered into a written contract with the Pacific Gas & Electric Company. This contract is designated a contract of agency. It purports ostensibly to employ the Pacific Gas & Electric Company to distribute the power developed from the Hetch Hetchy project by the City and County of San Francisco to consumers as the agent of the City and County of San

Francisco. It is the contention of the Government in this case that looking beyond the words 'agency' and 'consignment,' and at the substantial provisions of the contract, that this contract is not a contract of consignment, and is not a contract of agency, but is a contract for the sale of the electric energy developed by the City and County of San Francisco, largely as a result of a grant of public lands by the United States, to the Pacific Gas & Electric Company for the purpose of re-sale, and that the sale of this energy to the Pacific Gas & Electric Company for the purpose of resale is violative of the provisions of Section 6 of the Raker Act.

It is the contention of the Government in this case that Congress has clearly manifested in the Raker Act its intention to preserve for the People the electric energy developed as the result of grants of the public domain; that it was the intention of Congress, in making this grant to the City and County of San Francisco, that this electric energy should be used for the benefit of the people and should not be permitted to pass into the hands of private corporations to be by them sold back to the people at a profit to the private corporation or the private individual. Briefly, that is the issue in this case: Is this contract entered into by the City and County of San Francisco on July 1, 1925, a contract of agency, a contract merely by

which the City and County of San Francisco consigns to the Pacific Gas & Electric Company as its agent certain power for distribution, or is it a sale of power by the City and County of San Francisco to the Pacific Gas & [140] Electric Company for a definite sum to be paid monthly and thereafter sold by the Pacific Gas & Electric Company to its consumers under a contract entered into in the name of the Pacific Gas & Electric Company"?

The opening statement on behalf of the plaintiff having been concluded, counsel for the plaintiff, for the convenience of the Court, offered in evidence a copy of the Raker Act (38 Stat. 241) of which he stated judicial notice would be taken by the Court. Said copy of said Act was received in evidence, and marked

"U. S. EXHIBIT 1".

It reads as follows:

"An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest and the public lands in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the City and County of San Francisco, a municipal cor-

poration in the State of California, all necessary rights of way along such locations and of such width, not to exceed two hundred and fifty feet, as in the judgment of the Secretary of the Interior may be required for the purposes of this Act, in, over and through the public lands of the United States in the counties of Tuolumne, Stanislaus, San Joaquin and Alameda, in the State of California, and in, over and through the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels and conduits for conveying water for domestic purposes and uses to the City and County of San Francisco and such other municipalities and water districts as, with the consent of the City and County of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this Act; for the purpose of constructing, operating and maintaining power and electric plants, poles and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating and maintaining telephone and telegraph lines, and for the purpose of constructing, operating and maintaining roads, trails, bridges, tramways, railroads and other means of locomotion, transportation and communication, such as may be necessary or proper in the construction, maintenance and operation of the works con-

structed by the grantee herein; together with such lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley [141] within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation and maintenance of said water power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation and communication as may be established; together with the right to take, free of cost, from the public lands, the Yosemite National Park and the Stanislaus National Forest adjacent to its right of way, within such distance as the Secretary of the Interior and the Secretary of Agriculture may determine, stone, earth, gravel, sand, tufa and other materials of like character actually necessary to be used in the construction, operation and repair of its said water power and electric plants, its said telephone and telegraph lines, and its said means of locomotion, transportation or communication, under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park and the Stanislaus National Forest:

Provided, That said grantee shall file, as hereinafter provided, a map or maps showing the boundaries, location and extent of said proposed rights of way and lands for the purposes hereinabove set forth: Provided further, That the Secretary of the Interior shall approve no location or change of location in the national forests unless said location or change of location shall have been approved in writing by the Secretary of Agriculture.

Sec. 2. That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: Provided, however, That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes

of location of said rights of way or lands shall operate as an abandonment by the City and County of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps: And provided further, That any rights inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the [142] Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided for herein: And provided further, That with reference to any map or maps heretofore filed by said City and County of San Francisco or its grantor with any officer of the Department of the Interior or the Department of Agriculture, and approved by said department, the provisions hereof will be considered complied with by the filing by said grantee of copies of any of such map or maps with the register of the United States Land Office as provided for herein, which said map or maps and locations shall as in all other cases be subject to the approval of the Secretary of the Interior.

Sec. 3. That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or other existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining or

other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: Provided, however, that this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

Sec. 4. That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut or destroy any timber within the Yosemite National Park or the Stanislaus National Forest except such as may be actually necessary in order to construct, repair and operate its said reservoirs, dams, power plants, water power and electric works, and other structures above mentioned, but no timber shall be cut or removed from lands outside of the right of way until designated by the Secretary of the Interior or the Secretary of Agriculture, respectively; and it shall pay to the United States

the full value of all timber and wood cut, injured or destroyed on or adjacent to any of the rights of way and lands, as required by the Secretary of the Interior or the Secretary of Agriculture: Provided, That no timber shall be cut by the grantee in the Yosemite National Park except from land to be submerged or which constitutes an actual obstruction to the right or rights of way or to any road or trail provided in this Act: Provided, further, That for and in consideration of the rights and privileges hereby granted to it the said grantee shall construct and maintain in good repair such bridges or [143] other practicable crossings over its rights of way within the Stanislaus National Forest as may be prescribed in writing by the Secretary of Agriculture, and elsewhere on public lands along the line of said works, and within the Yosemite National Park as may be prescribed in writing by the Secretary of the Interior; and said grantee shall, as said water works are completed, if directed in writing by the Secretary of the Interior or the Secretary of Agriculture, construct and maintain along each side of said right of way a lawful fence of such character as may be prescribed by the proper Secretary, with such suitable lanes or crossings as the aforesaid officers shall prescribe: And provided further, That the said grantee shall clear its rights of way within the Yosemite National Park and the Stanislaus National Forest and over any public land of any debris or inflammable material as directed by the Secretary of the Interior and the Secretary of Agricul-

ture, respectively; and said grantee shall permit any road or trail which it may construct over the public lands, the Yosemite National Park or the Stanislaus National Forest to be freely used by the officials of the Government and by the public, and shall permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain within the Yosemite National Park and the Stanislaus National Forest, or on the public lands, together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials: And provided further, That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

Sec. 5. That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements: Provided, however, That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and deter-

mine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: Provided further, That the Secretary of the Interior shall [144] make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee: Provided further, That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations.

Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Sec. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be increased or diminished, pay the sum of $30,000 annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and

other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.

Sec. 8. That the word "grantee" as used herein shall be understood as meaning the City and County of San Francisco and such other municipalities or water district or water districts as may, with the consent of the City and County of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act.

Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated: [145]

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee:

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute, the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; or, with reference to the Hetch Hetchy Reservoir, in the waters from the reservoir or waters entering the river between it and the "Early intake" of the aqueduct pending the completion of the aqueduct between "Early intake" and the Hetch Hetchy dam site.

Fourth. The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee.

Fifth. If, at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.

(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District

and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.

(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary [146] for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water

as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: Provided, however, That at such times as the aggregate daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites; upon the express condition, however, that the said grantee may require the said

irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: Provided, however, That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior, the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: And provided further, That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation [147] districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of

stored water to be supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reasonable minimum as will assure the economical and beneficial use of such water.

(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolumne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

(i) That the said grantee shall, at its own expense, locate and construct, under the direction of the Secretary of the Interior, such weirs or other

suitable structures on sites to be granted, if necessary, by the United States, for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may direct, such apparatus and records to be open to inspection by any interested party at any time.

(j) That by 'the flow,' 'natural daily flow,' 'aggregate daily natural flow,' and 'what is naturally flowing,' as are used herein, is meant such flow as on any given day would flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed. [148]

(k) That when the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height.

(l) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for

drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy, as follows: The said

grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to [149] said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or

other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for

the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine, above and along the [150] proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site,

and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and maintain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

(s) That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.

(t) That the grantee herein shall convey to the United States, by proper conveyance, a good and sufficient title free from all liens and encumbrances of any nature whatever, to any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act, said conveyance to [151] be approved by and filed with the Secretary of the Interior within six months after the said grantee ceases to use such lands for the purpose of construction or repair under the provisions of this Act.

(u) That the City and County of San Francisco shall sell to the United States, for the use of the War Department, such water as the War Department may elect to take, and shall deliver the same through its system in or near the City of San Francisco to the mains or systems of such military reservations in that vicinity as may be designated by the Secretary of War, under such rules and regu-

lations as he may prescribe. In payment for such water and the delivery thereof the United States shall pay to the said City and County of San Francisco a rental, to be calculated at a fixed rate per one thousand gallons, said rate not to exceed the actual cost of said water to said City and County for all the water so furnished, as determined by meter measurements: And provided further, That payment of said rental shall be made by the local disbursing officer of the War Department in the usual manner: Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

Sec. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

Sec. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to

interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

Counsel for the plaintiff then pointed out that the complaint alleged that the grant made by the Raker Act, with its terms and conditions had been accepted by the defendant in an ordinance passed by its Board of Supervisors January 12, 1914, and approved by its Mayor, January 13, 1914, and filed by the defendant with the Secretary of the [152] Interior of the United States on January 21, 1914. Counsel for the plaintiff offered in evidence a copy of said Ordinance, together with a copy of a letter dated January 15, 1915, from the Mayor of San Francisco to the Secretary of the Interior, transmitting said Ordinance to said Secretary.

Counsel for the defendant objected to said Ordinance upon the grounds that it was irrelevant, immaterial and incompetent, and that the Board of Supervisors of the defendant, City and County, had no power to bind the defendant as to any particular method of distribution of its electric power, inasmuch as that matter rested entirely with the citizens.

Counsel for the plaintiff thereupon stated that the Raker Act was a grant of power upon certain con-

ditions and certain covenants to be performed by the grantee, the City and County of San Francisco, and that the plaintiff desired to show that the grant had been officially accepted by the defendant, and that pursuant to its acceptance thereof the defendant had entered upon and occupied certain portions of public lands of the United States, and used certain easements upon the public lands in the vicinity of the National Forest and Yosemite National Park and Stanislaus National Forest. Thereupon the Court overruled the objection of the defendant to said Ordinance, and admitted said ordinance in evidence. In its ruling admitting said Ordinance in evidence, the Court stated that it was admitted in evidence "to the extent limited in the offer".

Counsel for the defendant duly excepted to the ruling admitting said Ordinance in evidence; said Ruling and exception are herein designated as Ruling and Exception No. 1.

Said Ordinance and letter of transmittal were thereupon marked

"U. S. EXHIBIT 2".

Said Ordinance reads as follows: [153]

"BILL NO. 2855, ORDINANCE NO. 2598 (New Series)

"ACCEPTING THE TERMS AND CONDITIONS OF THE HETCH HETCHY GRANT.

"BE IT ORDAINED BY THE PEOPLE of the City and County of San Francisco as follows:

"That whereas, on the 19th day of December 1913, the President of the United States duly approved an Act of Congress entitled:

"'An Act Granting to the city and county of San Francisco certain rights of way in, over, and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes.'

"And whereas in subsection (S) of Section 9 of said Act it is provided 'That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.'

"NOW, THEREFORE, in accordance with the said provisions of said Act of Congress and in particular of subsection (S), Section 9 thereof, the City and County of San Francisco does hereby accept the said grant and all the terms and conditions therein contained, and the Mayor is hereby directed, upon approval of this ordinance to forthwith file with the Secretary of the Interior of the United States an official copy of this ordinance as evidence of such acceptance.

"This ordinance shall take effect immediately.

PASSED FOR PRINTING—Board of Supervisors, San Francisco, Jan. 5, 1914.

Ayes: Supervisors Bancroft, Caglieri, A. J. Gallagher, C. E. Gallagher, Giannini, Hayden, Hilmer, Hocks, Jennings, Koshland, Mauzy, McCarthy, McLaran, Murdock, Murphy, Nolan, Payot, Vogelsang.

FINALLY PASSED—Board of Supervisors, San Francisco, Jan. 12, 1914.

Ayes: Supervisors Bancroft, Deasy, Gallagher, Hayden, Hilmer, Hocks, Jennings, McCarthy, McLaran, Murdock, Nelson, Nolan, Payot, Power, Suhr, Vogelsang, Walsh. (One vacancy).

"J. S. DUNNIGAN

Clerk.

"Approved, San Francisco, January 13th, 1914.

[Seal] J. S. DUNNIGAN,

Clerk.

JAMES ROLPH,

Mayor."

Said letter of transmittal reads as follows:

"Mayor's Office, San Francisco,
January 15, 1914.

"Sir: [154]

"By direction of the Board of Supervisors of the City and County of San Francisco, approved by me as Mayor, I send you herewith certified copy of Ordinance No. 2598 (New

Series) with original signatures, said ordinance having been passed in compliance with the provisions of the Charter of the City and County of San Francisco, duly advertised, and approved by me as Mayor on January 13, 1914.

"This ordinance is passed by the City and County of San Francisco in compliance with subsection S of Section 9 of an Act of Congress, entitled 'An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes,' approved by the President of the United States on the 19th day of December, 1913.

"Respectfully yours,

JAMES ROLPH, JR.
Mayor, City and County of San Francisco.

To Hon. Franklin K. Lane,
Secretary of the Interior,
Washington, D. C."

Counsel for the plaintiff thereupon offered in evidence thirty-nine maps (being the maps, copies of which constitute "Exhibit C" annexed to the Amendments to the Bill of Complaint herein, filed June 25, 1937) which he said delineated the lands

and rights of way occupied and to be occupied by the defendant, City and County of San Francisco in the development of the Hetch Hetchy project, as described in paragraph VI of the complaint herein, and two additional maps which he stated were not in his possession at the time the amendments to the Bill of Complaint were filed, but which, he stated, covered portions of the land occupied by the City and County of San Francisco pursuant to the grant contained in the Raker Act.

Said forty-one maps were thereupon admitted in evidence and marked "U. S. Exhibit 3".

Because of their character and size it is impractical to set forth said maps herein, but said original exhibit, properly identified, will [155] be transmitted to the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal with like effect as though the same were incorporated herein.

Counsel for the plaintiff thereupon offered in evidence photostatic copies of the description by legal subdivisions of the lands referred to in paragraph VI of the Bill of Complaint. Said photostatic copies of said descriptions were admitted in evidence and marked "U. S. Exhibit 4".

Because of their character and size it is impractical to set forth said description by legal subdivisions herein, but photostatic copies thereof are incorporated herein, at this point and said original exhibit, properly identified, will be transmitted to

the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal with like effect as though the same were incorporated herein.

Counsel for the plaintiff thereupon offered in evidence a composite photograph of the plats filed by the City and County of San Francisco with the Secretary of the Interior showing the lands and rights of way taken by the City for the purpose of constructing its Hetch Hetchy project. Said photograph was admitted in evidence and marked "U. S. Exhibit 5". Because of its character and size it is impractical to incorporate said photograph herein, but a photostatic copy thereof is incorporated herein at this point, and said original exhibit, properly identified, will be transmitted to the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal as though the same were incorporated herein.

Counsel for the defendant, at this point, offered a similar composite photograph of the plats filed by the defendant with the Secretary [156] of the Interior and showing the lands and rights of way taken by the City for the purpose of constructing its Hetch Hetchy project. Said photograph offered by the defendant was received in evidence and marked "Defendant's Exhibit A".

Because of the character and size of said photograph it is impractical to incorporate the same herein, but a photostatic copy thereof is incorpo-

rated herein at this point, and said original exhibit, properly identified, will be transmitted to the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal with like effect as though the same were incorporated herein.

Counsel for the plaintiff thereupon offered in evidence a certified copy of a contract dated July 1, 1925, between the Board of Public Works of the City and County of San Francisco (acting for and on behalf of said City and County), and Pacific Gas and Electric Company, with respect to the distribution of the electric energy generated by the defendant in connection with its Hetch Hetchy project and a copy whereof marked "Exhibit A" is annexed to defendant's answer herein. Said contract was admitted in evidence and marked "U. S. Exhibit 6". Said contract is not incorporated herein because a copy thereof is annexed to defendant's answer as aforesaid, and is included in the judgment roll herein.

Counsel for the plaintiff thereupon offered in evidence a certified copy of a telegram dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of the City and County of San Francisco. Counsel for the defendant objected to said telegram upon the ground that it was irrelevant, incompetent and immaterial, and a mere self-serving declaration. Counsel for the plaintiff stated that the offer was made to prove that the Secretary of the Interior had made the decision

required by Section 9 U of the Raker Act and that his decision was not an arbitrary one, but was one arrived at after an open hearing at which the defendant was represented, and because of the denial in the answer of the allegation in the complaint to the effect that the Secretary of the [157] Interior, pursuant to the terms of the Raker Act, and more specifically Section 9(u) thereof, did on April 2, 1937, advise the Honorable Homer Cummings, Attorney General of the United States of the failure and refusal of the defendant to observe and comply with other terms and conditions of the Raker Act, and did in writing, request that suit be instituted for the purpose of enforcing and carrying out the same. Thereupon the Court admitted said telegram in evidence, and stated, in connection with its ruling, that said telegram was admitted "for the purpose of the offer". Counsel for the defendant duly excepted to the ruling admitting said telegram in evidence; said ruling and exception are hereby designated as Ruling and Exception No. 2.

Said telegram was marked

"U. S. EXHIBIT No. 7".

It reads as follows:

"In view of charges that Raker Act is violated by present arrangement between City and County of San Francisco and the Pacific Gas and Electric Company, I have arranged for a hearing on the subject in my office the afternoon of May six at two o'clock, at which I hope

City and County of San Francisco will be represented.

HAROLD L. ICKES,
Secretary."

Counsel for the plaintiff thereupon offered in evidence a certified copy of a letter dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to H. G. Cahill, Manager of Public Utilities of San Francisco. Counsel for the defendant objected to said letter upon the ground that it was incompetent, irrelevant and immaterial, self-serving, and upon the further ground that the defendant was raising no question that the approval of the Secretary of the Interior to the enlargement of Hetch Hetchy Dam according to plans and specifications theretofore submitted to him, was a waiver of any right of the plaintiff under the Raker Act. The Court overruled said objection and admitted said letter in evidence. Counsel for the defendant duly excepted to the ruling admitting said letter in evidence; said ruling and excep- [158] tion are herein designated as Ruling and Exception No. 3. Said letter was marked

"U. S. EXHIBIT No. 8".

It reads as follows:

"My dear Mr. Cahill:

"With your letter of November 20, 1934, you transmitted revised plans and specifications for the enlargement of the Hetch Hetchy Dam. Inasmuch as those plans have been found satis-

factory by the National Park Service and the Bureau of Reclamation, I have today sent you the following telegram:

"'Am mailing you letter today giving you my formal approval to proceed with enlargement of Hetch Hetchy Dam according to plans and specifications heretofore submitted. Question has been raised whether provisions of Raker Act are being violated by present arrangement with Pacific Gas and Electric Company and permission to proceed with addition to Hetch Hetchy Dam is not to be regarded as direct or implied approval of that arrangement. There will be an open hearing in my office on question whether Raker Act is being violated afternoon of May six at two o'clock, at which I hope your Commission will be represented."

"I am also telegraphing Mayor Rossi with reference to this hearing and expressing the hope to him that the City and County of San Francisco will be there represented. This hearing will be open to anyone interested and opportunity will be offered to present divergent views.

Sincerely yours
(Sgd.) HAROLD L. ICKES
Secretary of the Interior."

Mr. H. G. Cahill,
Manager of Utilities,
Public Utilities Commission of San Francisco,
San Francisco, California."

Counsel for the plaintiff thereupon offered in evidence a certified copy of telegram dated March 14, 1935, from Angelo J. Rossi, Mayor of San Francisco, to Harold L. Ickes, Secretary of the Interior. Counsel for the defendant objected to said telegram upon the ground that it was incompetent, irrelevant and immaterial. The Court overruled said objection and admitted said telegram in evidence. Counsel for the defendant duly excepted to the ruling of the Court admitting said telegram in evidence; said ruling and exception are hereby designated Ruling and Exception No. 4. Said telegram was marked

"U. S. EXHIBIT No. 9".

It reads as follows: [159]

"San Francisco, Calif., March 14, 1935.

"Hon. Harold L. Ickes,
Secretary of the Interior, Washn., D. C.

"I acknowledge receipt of your wire of this date re Hetch Hetchy Power Stop I note your statement that charges have been filed wherein it is alleged that San Francisco is violating provisions of the Raker Act as to distribution of power Stop Please send me copies of same Stop We appreciate the invitation to be present at the hearing on May sixth Stop San Francisco will be represented at that time.

ANGELO J. ROSSI
Mayor."

Counsel for the plaintiff thereupon offered in evidence a letter dated March 15, 1935, from Harold L. Ickes, Secretary of the Interior to Angelo J. Rossi, Mayor of the City and County of San Francisco. Counsel for the defendant objected to said letter on the ground that it was incompetent, irrelevant, immaterial and self-serving. The Court overruled said objection and admitted said letter in evidence. Counsel for the defendant duly excepted to the ruling admitting said letter in evidence; said ruling and exception are herein designated as Ruling and Exception No. 5. Said letter was marked

"U. S. EXHIBIT No. 10".

It reads as follows:

"Hon. Angelo J. Rossi, Mayor,
San Francisco, California.

"My dear Mayor Rossi:

"I have received your telegram of March 14 concerning the alleged violation of the Raker Act arising from the method by which Hetch Hetchy power is being distributed. I am, of course, pleased that San Francisco will be represented at the hearing which I have set for May 6.

"No formal charges have been filed to which San Francisco must make specific response. I have, however, received communications from various individuals contending that the exist-

ing arrangement; whereby the Pacific Gas and Electric Company distributes power generated on the Hetch Hetchy project, constitutes a violation of the prohibition contained in that portion of section 6 of the Raker Act, which reads as follows:

> 'That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee * * * ' [160]

It is that contention in which I am interested and which I desire to consider at the hearing on May 6.

"I hope that, at the hearing, San Francisco and any other interested parties may present facts and argument sufficient to make possible a final determination of this important matter.

Sincerely yours,

(Sgd.) HAROLD L. ICKES
Secretary of the Interior."

Counsel for the plaintiff thereupon offered in evidence a certified copy of an opinion rendered by Harold L. Ickes, Secretary of the Interior, on August 24, 1935, (which counsel stated followed the hearing held by him on May 6, 1935, which is mentioned in the aforesaid letter of March 15, 1935 (U. S. Exhibit No. 10). Counsel for the defendant

objected to the offer upon the ground that it was incompetent, irrelevant and immaterial, and self-serving. Thereupon counsel for the plaintiff stated that the offer was made to show compliance with the terms of the Raker Act, namely, that after a hearing by the Secretary of the Interior, he rendered a decision that the contract of July 1, 1925, constituted a violation of Section 6 of the Raker Act and had so notified the City and County of San Francisco; also to show that the Secretary's determination was not an arbitrary action. The Court, thereupon, overruled defendant's objection and received the letter in evidence, stating in connection with its ruling, that the opinion was admitted for the limited purpose stated by counsel for the plaintiff. Thereupon the attorney for the defendant duly excepted to said ruling admitting said opinion in evidence. Said ruling and exception are herein designated as Ruling and Exception No. 6.

Said opinion was marked

"U. S. EXHIBIT No. 11";

it reads as follows:

"United States
Department of the Interior
Office of the Secretary
Washington

August 24, 1935.

SUMMARY OF OPINION [161]

1. The controversy concerning the legality of the distribution of Hetch Hetchy power by

the Pacific Gas and Electric Company has been before the Department, in one form or another, for approximately 12 years.

2. The arrangement, founded on the contract of July 1, 1925, whereby the Pacific Gas and Electric Company distributes the power generated at the Moccasin plant on the Hetch Hetchy project, constitutes a violation of the provisions contained in section 6 of the Raker Act.

3. The direct sale by San Francisco to the Pacific Gas and Electric Company of power generated at the Early Intake power plant also constitutes a violation of the provisions contained in section 6 of the Raker Act.

4. The legislative history of the Raker Act clearly shows that the purpose of section 6 was to prevent the water or power developed on the Hetch Hetchy project from ever falling into the hands of a private corporation or monopoly. From the facts it appears that the power developed on the Hetch Hetchy project has fallen into the hands of just such a corporation or monopoly.

United States
Department of the Interior
Office of the Secretary
Washington

August 24, 1935.

In re the contract between San Francisco and the Pacific Gas and Electric Company in relationship to the Raker Act.

The question before me for decision is whether the action of the City and County of San Francisco in contracting with the Pacific Gas and Electric Company for the distribution of electric power generated by it in connection with the Hetch Hetchy Project constitutes a violation of the provisions of the Raker Act (38 Stats., 242). By that act the City and County of San Francisco was authorized to construct and operate the Hetch Hetchy Project within the Yosemite National Park, the Stanislaus National Forest and the public domain of the United States.

In the autumn of 1934 I instructed the Solicitor of the Department of the Interior to advise me whether, in his opinion, the Raker Act was being violated. Shortly thereafter I directed the Director of the Division of Investigations to investigate and report to me on the facts in connec- [162] tion with the arrangement between the City and County of San

Francisco and the Pacific Gas and Electric Company whereby the latter named corporation was distributing this electric power. This report on the facts was submitted to me on February 4, last, with an accompanying memorandum by the Solicitor on the law involved. Thereafter, on May 6, last, I held an open hearing at the Interior Department in the City of Washington, at which San Francisco and other interested parties were represented. At and since the time of that hearing several briefs pertinent to the inquiry have been filed with me and a considerable amount of argumentative correspondence has been received.

After careful consideration of all the facts presented and of the arguments made on behalf of the City and County of San Francisco, and other interested parties, I have come to the conclusion that the provisions of the Raker Act are being and for some time past have been violated. As the parties in interest are entitled to know upon what grounds my conclusion is based, I shall discuss as briefly as may be the facts and the law that seem to me to be applicable to and controlling of the issues involved. First, however, I believe it would be helpful to a clear understanding of the case to present a resume of the history of the problem that is before me for decision.

I.

On May 8, 1923, the National Park Service called to the attention of the Secretary of the Interior the fact that the City and County of San Francisco was openly selling Hetch Hetchy power to the Pacific Gas and Electric Company which, in turn, was selling that power to its consumers. First Assistant Secretary Finney, on May 22, 1923, requested the opinion of Solicitor Edwards concerning the legality of that procedure. In an opinion dated June 8, 1923, the Solicitor determined that any sale of Hetch Hetchy power for the purpose of resale was prohibited by the Raker Act. He recognized the fact, however, that due to the difficulty of acquiring or constructing a distributing system a great waste of power would result unless the then existing distributing facilities might be utilized. To obviate such a possibility of waste he suggested that an arrangement be made 'by which the grantee would have its power transmitted over the lines of the concern owning or controlling the existing distribution system'.

Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. The propriety of that contract, under which power is still being distributed by the private concern, was questioned immediately. On July 20, 1935, Acting Solicitor

Wright rendered an opinion in which, after significant reference to the temporary character of the contract and the inability of San Francisco to obtain its own distributing system for at least two years, [163] he held that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute. The opinion, however, did recognize the fact that operations under the contract might be conducted in such a way as to constitute a violation of the statutory prohibitions.

A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate. In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Immediately after pointing out that the contract might be viewed (1) as Proper, (2) as improper, or (3) as proper because temporary, he stated, 'In the exercise of your discretion you may come to the conclusion that this last is the correct view.'

After receiving that advice, Secretary Work on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would

be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time.

Apparently the issue lay dormant until it was brought to life by Congressman Crampton who, on May 19, 1928, delivered on the floor of the House of Representatives a vigorous attack against San Francisco, charging, among other things, the sale of electric power to the Pacific Gas and Electric Company in 'direct and open violation' of the Raker Act. Cong. Rec., vol. 69, p. 9236. See also Cong. Rec. vol. 69, pp. 9239-9242. On February 23, 1929, Congressman Crampton wrote to Secretary West in effect demanding action because of San Francisco's violation of the statutory provisions regarding the sale of power. As a result of that demand Secretary West, on March 2, 1929, wrote to Mayor Rolph requesting certain information concerning the performance of the power sales contract and concerning the time which must elapse before San Francisco might acquire its own power distributing system. Mayor Rolph's reply of April 4, 1929, addressed to Secretary Wilbur, indicated the profits which had been realized by San Francisco from the contract and set out in some detail the steps

which had been taken by the City and County looking toward the acquisition of the distributing systems of the Pacific Gas and Electric Company and the Great Western Power Company. (The latter company has since been absorbed by the former.) At that time proceedings had been begun before the California Railroad Commission for the purpose of fixing the value of the properties of those two companies so that a purchase might be effected.

With those materials at hand Solicitor Finney, on May [164] 29, 1929, rendered an opinion in which it was set out that 'any method for the distribution of the power generated under this grant, involving an element of private gain, can only be justified as a temporary arrangement, and to avoid waste, and only so long as the City and County in the meantime are proceeding in good faith and with diligence to comply with the conditions and to meet the obligations imposed upon them by the law and the acceptance of the grant.' The Solicitor, however, refused to express his opinion on the facts before him, saying that, since the Attorney General must bring suit if a violation existed, the opinion of that official should be had. Such an opinion was requested in a letter dated February 28, 1930. To that request Attorney General Mitchell responded on April 26, 1930, suggesting that representatives of the

two departments confer 'to develop the situation more fully.'

When the representatives met it was determined that additional information was necessary. Eventually it was learned not only that the California Railroad Commission had fixed a value on the distributing systems of the two concerns which San Francisco desired to purchase, but also that the City and County had arranged to submit to the electors on August 26, 1930, a proposed bond issue sufficient to finance the acquisition of the necessary systems. In view of those facts the Attorney General suggested, and Secretary Wilbur agreed, that no further action be taken until the result of the election had been determined. The electors, however, failed to approve the bond issue.

After that, Secretary Wilbur arranged a conference, after notice to the Attorney General, at which San Francisco was given an opportunity to present its case. For the consideration of that conference Secretary Wilbur, on November 8, 1930, transmitted to the Mayor of San Francisco a memorandum stating that the Department 'cannot permit the arrangement between the city and the company to go on indefinitely, as an end in itself', and suggesting three courses of action open to San Francisco: (1) the immediate calling of another bond election; (2) the termination of the 'agency' contract in the absence of a bond election; or (3)

application to Congress for modification of the Raker Act.

At the conference, which was held on December 4, 1930, San Francisco submitted further argument concerning the legality of the contract with the Pacific Gas and Electric Company as a temporary expedient. With that argument apparently there was submitted, although there appears to be no copy of it in the files, a tentative program whereby San Francisco proposed to acquire a distributing system and terminate the existing contract within three years. The only reference found to any departmental consideration given to, or action taken on, San Francisco's plea is the following short paragraph contained in a letter of December 8, 1930, from Secretary Wilbur to Mr. John J. O'Toole, city attorney of San Francisco. [165]

> 'I note that your communication advises the Department of the City's three-year program for compliance with the provisions of the Raker Act respecting power distribution, which will be followed with interest. Kindly keep me advised of the completion of the successive steps outlined.'

Subsequent to this communication, the departmental files show nothing pertinent to this question until the present inquiry was begun. It does appear, however, that another bond election was held in San Francisco on September 29, 1933, for the purpose of authorizing

the sale of bonds sufficient to construct a small municipal distributing system. This bond proposal was also rejected by the voters.

II.

It is necessary to a determination of the issues to consider in some detail the statutory provisions relating to the disposal of the power generated from the Hetch Hetchy project. It is also necessary to consider the terms of the contract under which the Pacific Gas and Electric Company has been and is distributing that power.

In Section 9 (f) of the Raker Act there is an express provision covering the use to which electric power may be put. It is to be utilized first for the pumping of the water supply for San Francisco and for the actual municipal needs of the City and County not including 'sale to private individuals or corporations.' Any excess of power must be sold, on request, to satisfy the needs of the landowners of the Modesto Irrigation District and the Turlock Irrigation District for the pumping of subsurface waters to effectuate irrigation or drainage and for the needs of municipalities within those districts, again not including 'sale to private individuals or corporations'. Any remaining power may be sold by San Francisco to private individuals, corporations or others 'for commercial purposes'. This authority is limited,

however, by section 6 of the act which provides:

> 'That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.'

It has been argued that a direct sale of power by San Francisco to the Pacific Gas and Electric Company for the express purpose of resale would not constitute a violation of the prohibitions contained in section 6 for the reason that the company, as a public utility, already has the right to sell power to consumers, and, thus, need not be invested [166] by the City and County with that right in violation of the statutory prohibitions. This contention confuses the right or authority of the company to sell power in general to consumers with its right to sell them the power generated through the operation of the Hetch Hetchy project. It also confuses the authority of a private corporation, under the terms of its charter and the provisions of laws

creating it, to dispense among consumers such electric energy as it is in a position legally to control with the disability of the City and County of San Francisco, under the terms of the Hetch Hetchy grant, to sell or let Hetch Hetchy water or power to such a corporation for purposes of resale to consumers. In each instance, it is the latter, not the former, that is in issue here.

We are not particularly concerned with the question whether the sale or disposition of Hetch Hetchy power by the Pacific Gas and Electric Company to consumers is ultra vires. The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act. This question depends not on the charter or statutory powers of the company to dispose of electric energy whose disposition is legally subject to its control, but on the power of San Francisco to vest in the company any right to dispose of Hetch Hetchy energy at all where the disposition contemplated inevitably must take the form of a distribution of the power by the company among its consumer customers. Since the only authority which the City and County of San Francisco can have to dispose of the electric energy generated at Hetch Hetchy is derived from the Hetch Hetchy

grant, we must look at the provisions of that grant and of the Raker Act embodying it to see whether such a disposition is within or outside of the scope of the delegated authority. And looking at those provisions we cannot reasonably refuse to see that under the limitations on the authority of San Francisco to dispose of the Hetch Hetchy energy, expressly imposed in section 6 of the act San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers. See Solicitor's opinions of June 8, 1923 (M. 10228) and October 27, 1933 (M. 27615, 51 I. D. 316).

It has also been argued that this construction of the statute is improper because it forces on San Francisco municipal ownership and operation of distributing facilities, a result that was neither intended by nor within the power of Congress. That Congress did not intend to force municipal ownership and operation on San Francisco would, of course, be immaterial even if true. An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated merely because its necessary consequence is to compel San Francisco to acquire and operate a distributing system of its own. Indeed, the natural conclusion is

that Congress intended to bring about the results flowing from the limitations which it imposed. A clear ex- [167] pression by Congress in the statute that it was not intended that San Francisco should acquire a municipal distributing system would, to be sure, serve to cast doubt on the validity of any construction of section 6 necessitating the acquisition of such a system by San Francisco. But there is nothing in the act which expressly or by legitimate implication can be taken to express such an intention. In the absence of any such expression of intention, there is no reason to refuse either to indulge the usual inference as to the legislative intention or to give effect to the claim of an unexpressed prohibition because failure so to do would lead to a consequence not specifically spelled out in the act.

The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, while true, (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment. We are dealing merely with a specification by Congress of the terms and conditions under which it was willing to grant certain rights to San Francisco with respect to the generation and

utilization of electrical energy on the federally owned land embracing the Hetch Hetchy project. Congress, exercising its duly delegated legislative powers under the Constitution, had full authority to prohibit anyone, including San Francisco, from having any access at all to this land belonging to the United States. It also had full authority to dispose of that land or of the right to generate electric energy thereon under any conditions which it saw fit to impose.

This is exactly what was done by the Raker Act. San Francisco was granted certain rights on federally owned lands, subject to various conditions, among them those contained in section 6 prohibiting sale for the purpose of resale of any electric power developed on the land. The City and County was not compelled to accept the grant if it was unwilling to observe the limitations on which the grant was conditioned. When it accepted the grant, it acted voluntarily for the purpose of obtaining the benefits conferred, but by that same act it obligated itself to comply with the conditions imposed. Certainly San Francisco cannot continue to enjoy those benefits and at the same time repudiate the conditions on which their enjoyment, by the very terms of the grant, is made to depend. See Denver v. New York Trust Company, 229 U. S. 123, and also Trustees of Dartmouth College v. Woodward, 4 Wheat 518; Atkins v. Kansas,

191 U. S. 207; Heim v. McCall, 239 U. S. 175. The method by which San Francisco is to comply with those conditions is, of course, a matter to be controlled by the provisions of its charter. But in good faith it must exercise its powers to the full in order to carry out its obligations under the Raker Act, and, if necessary, even such an enlargement or amendment of those powers.

At the hearing on May 6 it was also sought to cast doubt on the meaning of section 6 by insisting that the [168] requirements contained in section 9, subsection (m), that certain designated amounts of power must be generated by San Francisco 'for municipal and commercial use' might be impossible to perform if sale for the purpose of resale were not permissible. Congress, however, provided, in section 9 (m), that lesser amounts of power might be generated if 'in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development.' Consequently, if no market for Hetch Hetchy power exists which may be served without a violation of the conditions imposed by Congress, including those contained in section 6 of the act, the Secretary may determine that the public interest does not require the generation of the prescribed amounts of power. Thus there is no conflict between the provisions of the act and no ambiguity concerning the meaning of section 6.

For these various reasons I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the purpose of resale and that this prohibition is legally valid. Since the meaning of the section is, in my opinion, clear and unequivocal, recourse to the legislative history of the Raker Act is neither necessary nor permissible. I may say, however, that an exhaustive examination of the history of the Raker Act when it was being considered by Congress unquestionably supports the interpretation which has been placed on section 6.

The contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company undoubtedly was drafted and executed with this section in mind and in the light of the suggestion contained in the Solicitor's Opinion of June 8, 1923, that a temporary arrangement be made for distributing power through the existing facilities of private concerns. Throughout this contract the language of consignment is used. However, true consignment is not a sale; it merely constitutes the consignee an agent of the consignor for a particular purpose—in this case to sell and distribute electric power. If there be a true consignment, the sale to the consumer is directly by the consignor. The consignee has not purchased the commodity himself and then resold it; he has merely negotiated a sale for and on behalf of the con-

signor. So if this particular contract is not of the latter type, if it does in fact contemplate a purchase of power from San Francisco by the Pacific Gas and Electric Company, it constitutes a violation of the Raker Act, for it also clearly contemplates that someone other than the Pacific Gas and Electric Company may ultimately purchase the power after it has once been delivered to that company.

The mere fact that the contract uses the language of consignment is not sufficient to establish its character. The substance of the instrument may be such as to make the transaction one of sale despite verbal twistings and turnings intended to cause it to appear to be one of consignment only. Standard Fashion Co. v. Magrane Houston Co., 258 U. S. 346; Vermont Marble Co. v. [169] Brow, 109 Cal. 236, 41 Pac. 1031; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542. In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute.

In the introductory recitals of the contract there are alleged the desire and effort of the City and County to acquire a distributing system of its own and the necessity, in order to prevent waste of power and loss of potential revenue, of effecting a temporary arrangement whereby the company may distribute Hetch Hetchy power until the City and County can

acquire its own facilities. In the body of the contract it is agreed that San Francisco 'employs' the company temporarily to distribute electric energy, and that the entire output of the Moccasin Power House, the large unit on the Hetch Hetchy project, except power needed for construction of the project or needed to supply irrigation districts or other municipalities, shall be delivered and consigned to the company's substation in Newark. Based on the experience of the company in transmitting power from Newark to consumers in San Francisco, it is agreed that distribution losses amounting to 24 percent of the power delivered at Newark shall be deducted from the total amount delivered and that the company shall pay to the City and County 26.935 percent, and retain as compensation for its services 73.065 percent, of the average revenue received by it for the remaining 76 percent of the 'consigned' power. For the purposes of the contract it was assumed that the average revenue received by the company was 2.383 cents per kilowatt hour, a figure obtained by computation based upon the established rates for the year 1924. Any change in the established rates is to cause a proportionate change in the amount to be paid to the City and County. The contract then provides that, in case of the refusal, failure, or inability of the company to accept and distribute the power offered at Newark by the City

and County, the company shall make payment on the basis of the amount of power which the City and County could have delivered.

Because of the temporary character of the arrangement, the contract expressly provides for its termination at any time by either party on one day's notice. It also provides for 'immediate cancelation upon request or demand of the Secretary of the Interior of the United States, should he hold that in his opinion the agreement violates any provisions of the laws of the United States in general, or the Raker Act in particular'.

In speaking for the United States Circuit Court of Appeals for the Eighth Circuit concerning factorage contracts, which are agency contracts involving consignments, Judge Booth has aptly said:

> 'But in recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and of their lawyers have evolved a class of contracts which have the earmarks of both sale contracts and factorage contracts. It is not always [170] easy to determine into which class a particular contract falls. If it becomes necessary to decide the question, all the court can do is to consider the various earmarks as disclosed by the contract, and the surrounding facts and circumstances, and determine, as best it can, into which class the contract should be

placed.' Marrinan Medical Supply, Inc. v. Ft. Dodge Serum Co., 47 Fed.(2d) 458, 460.

The difficulties surrounding the consideration of the present case are greater by reason of the character of the commodity which is the subject matter of the contract. Electric power is not a tangible, material thing. It can be stored only in quantities too small to be of significance in a sale or consignment contract. Because of its characteristics, power alleged to have been consigned by A to B cannot be segregated from other power owned by B; an accounting of the sales of the allegedly consigned power cannot be made by B separate from an accounting of the sales of his own power; the proceeds of the sales of the consigned power cannot be separated from the proceeds of the sales of B's own power; and any unsold surplus of the consigned power, even if it could be segregated, cannot for practical reasons be returned by B to A. Yet each of these enumerated things which cannot be done with respect to power is, if done, one of the characteristics which serves to distinguish a consignment from a sale. Because of the intrinsic nature of electricity, therefore, the concept of a consignment thereof presents something of an anomaly. It may be that electricity is not capable of consignment; at least it may not be possible of consignment to a company which distributes it, as does the Pacific Gas and Electric Company, by means of facilities

through which flows other power owned by it.

It is, however, unnecessary to decide this question on the facts that have been recited inasmuch as the contract possesses sufficient characteristics, in my opinion, to stamp it indelibly as one of sale for the purpose of resale.

It is fundamental in the law of agency and consignments that the activities of the agent or consignee, concerning the commodity entrusted to him by the consignor, are subject to the direction and control of the consignor. Yet neither this contract nor the course of action adopted by the parties under the contract indicate that San Francisco retains any power to direct or control the method of handling, distributing or selling Hetch Hetchy power after it is delivered to the Pacific Gas and Electric Company at Newark. In the absence of provisions forcibly compelling a contrary conclusion, this fact alone is sufficient to classify the transaction as one of sale for the purpose of resale rather than one of consignment for sale on behalf of the consignor. As incidents of this general proposition it may be said that mere freedom on the part of the alleged consignee in the making of sales to customers is sometimes considered almost conclusive in establishing that the transaction between the alleged con- [171] signor and consignee is one of sale (see In re Wayside Furniture Co., 67 Fed.(2d) 201; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542), and that the

fact that the alleged consignee disposes of the commodity in the ordinary course of its retail trade to its usual customers indicates a sale rather than a consignment (see Public Utilities Commission v. Landon, 249 U. S. 236, 245).

Instead of provisions leading to a contrary opinion, this contract contains language forcibly compelling the conclusion that the transaction at issue is one of sale to and resale by the Pacific Gas and Electric Company. The company is bound to, and actually does, pay for all power delivered to it by San Francisco whether or not that power is resold. In commenting upon this feature of the arrangement the Pacific Gas and Electric Company in its April, 1934, issue of 'Progress', a regular publication issued by it, stated:

> 'The city simply turns the power on and leaves it to the P. G. and E. to dispose of it at a time when it has a large surplus of its own.
>
> The P. G. and E. is not like a private customer who can turn the power on and off when he wants to. It must take all the city's power as and when it comes and must pay for it whether it has a market or not.'

There can be no doubt that this requirement of the contract definitely fixes the character of the transaction. It is one of sale for the purpose of resale. The very essence of consignment is that the consignee, acting merely as the

agent of the consignor, effects a transfer of title to the consigned commodity directly from the consignor to the ultimate purchaser. The consignee is merely an instrumentality to effect that transfer and is not responsible to the consignor for the price of the commodity unless he has also acted as the consignor's agent for the collection of that price from the ultimate purchaser. In the latter case he is responsible to the consignor either for the money actually collected by him or for the price of the commodity sold whether or not he has collected from the consumer. Whether the one or the other of these liabilities exists depends on the terms of the consignment contract, but in no instance is the consignee directly obligated to pay for the consigned commodity if a sale of it is not effected by him. If he is obligated to pay for everything delivered to him, he is not acting on behalf of the alleged consignor in effecting a subsequent sale to consumers; he is acting on his own behalf. He has purchased the commodity and a subsequent sale is a resale. See Sturm v. Boker, 150 U. S. 312, In re Sachs, 31 Fed.(2d) 799; In re United States Electrical Supply Co., 2 Fed.(2d) 378; In re Thomas, 231 Fed. 513; Parlett v. Blake, 188 Fed. 200; Coweta Fertilizer Co. v. Brown, 163 Fed. 162; In re Galt, 120 Fed. 443; D. M. Ferry Co. v. Hall, 188 Ala. 176, 66 So. 104; Peoria Manufacturing Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; Norwegian

Plow Co. v. Clark, 102 Ia. 31, 70 N. W. 808; Arbuckle Bros. v. Kirkpatrick [172] & Co., 98 Tenn. 221, 39 S. W. 3. Compare Ludvigh v. American Woolen Co., 231 U. S. 522.

Besides its admitted liability for power delivered, whether or not it is sold to consumers, the Pacific Gas and Electric Company has assumed in addition an absolute obligation to pay for power offered to it by San Francisco *even though the company does not accept it.* It would appear that here again the obligation is completely inconsistent with the theory of consignment. The reasoning in the cases set out above establishes the fact that one who is obligated to pay, whether or not he effects a sale to consumers, is a purchaser and not a consignee for the reason that any subsequent sale is of no benefit to the alleged consignor and, therefore, is not on his behalf. Certainly no subsequent sale of power by the company can be of benefit to San Francisco, and thus be made on its behalf, where a binding obligation to pay is imposed on the company by the mere offer of power at Newark whether or not the company accepts it. The contract, therefore, cannot be one of consignment. It can, however, be one of sale, giving the right to the company to resell any power which is received by it, for it is not inconsistent with the theory of a contract of sale that a commodity offered must be paid for even though it is not accepted. See Swift & Co.

v. Columbus Railway, Gas & Electric Co., 17 Fed.(2d) 46, in which substantially such a provision was enforced in connection with the sale of electric power.

In my opinion these significant characteristics of this transaction between San Francisco and the Pacific Gas and Electric Company conclusively disclose the nature of that transaction. It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers.

This conclusion is not affected by the existence in the contract of the provision that San Francisco shall receive payment only for the power offered or delivered at Newark less the estimated amount of power lost in transmission from that point to the consumers, which amount is definitely fixed at 24 percent of the total. This provision, in effect, throws on San Francisco the burden of the estimated loss at any time before the power passes to the ultimate purchaser. The placing on the alleged consignor of the risk of loss is one of the characteristics of a true consignment. It is, however, not necessarily inconsistent with a sale, for buyer and seller are always free to provide by express agreement how, when, and by whom, the risk of loss is to be borne. Viewed in the light of the other characteristics of the agreement, even a complete and genuine assumption by San Francisco of the risk of loss would

not necessarily stamp the contract as one of consignment rather than one of sale. The assumption of loss would be, as it actually is, merely an ingredient in a formula used in determining the sale price. *A fortiori* is this so where, as here, there is no true assumption of actual loss, but merely an agreement upon an arbitrary and fixed percentage representing an approximate estimate of expected actual loss.

[173]

Likewise my conclusion that the transaction is one of sale for the purpose of resale is not varied by the fact that payment to the City and County of San Francisco is, according to the terms of the contract, not at a fixed price but on the basis of determined percentage of a variable retail electric power rate. A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree. Consequently, this type of provision for payment cannot be said to change the transaction from one of sale to one of consignment, and it was so held in Public Utilities Commission v. Landon, supra. Furthermore, it is pertinent to point out that, according to the facts before me, the company has paid continually to the City and County the same rate per kilowatt hour of electricity despite changes in the rates charged to consumers effective in 1928 and 1930. Even though the rate changes may have been made at the request of the

company, these facts, establishing payment to the alleged consignor at a fixed price irrespective of variation in the price placed on sales by the alleged consignee, present another indication, although not a conclusive one, of a sale rather than a consignment. See In re Rabenau, 118 Fed. 471. Compare Dryden v. Michigan State Industries, 66 Fed.(2d) 950; McCollum v. Bray-Robinson Clothing Co., 24 Fed.(2d) 35. (That it is proper to look to the facts, such as those pertaining to the conduct of the parties under the contract, is established in such cases as Ludvigh v. American Woolen Co., supra; In re Thomas, supra; and Flanders Motor Co. v. Read, 220 Fed. [illegible].)

In the various briefs that have been submitted for consideration it has been suggested that a determination of the nature of the contract between San Francisco and the Pacific Gas and Electric Company should follow the decision of the Supreme Court of California in the case of Los Angeles Gas and Electric Corporation v. City of Los Angeles, 188 Cal. 307. In that case the court held that a contract between Los Angeles and certain power companies, whereby the city's power would be distributed through the facilities of those companies, did not violate a provision of the city charter prohibiting the sale of that power for the purpose of resale. In arriving at that conclusion the court laid stress on the fact that the

charter provision should not be construed as prohibiting a temporary arrangement for the distribution of power pending the purchase or construction of the city's own facilities.

The facts of the case, as they may be gathered from the opinion, are materially different from those in the case at issue. The Los Angeles contract contemplated the purchase by the city of the facilities then owned by the con- [174] tracting power companies and, in the words of the court, it was 'more in the nature of an agreement regulating the use and possession of property for the buyer and seller pending the consummation of the sale thereof.' In that contract it was provided that, during the interim prior to consummation of the sale, the city's power should be distributed through the companies' facilities and that, both before and after the consummation of the sale, the city should purchase from the companies 25,000 horse power of electric energy to augment its own supply.

In other words *all* the power in the lines of the companies belonged to the city. Also, the city acquired a measure of control over the operation of the facilities, and thus over the distribution of its power, by reason of its stipulated right to appoint two members of a board, composed of four members, whose duty it was to operate the distributing system pending the consummation of the purchase. The

companies, as compensation for the use of their property, were compelled to look to a fixed percentage of the amounts realized from the sale of power to consumers. The City, on the other hand, received as compensation, not the value of the power owned by it, whether sold or not, but the remainder of the amount realized from actual sales to consumers after the percentage accruing to the companies.

Inasmuch as it is the absence of such provisions as these and, some instances, the presence of contrary provisions, that justify my opinion that the San Francisco contract is one of sale for the purpose of resale, it is obvious that the decision of the court in Los Angeles case does not affect my conclusion that the Raker Act is being violated.

From the foregoing it must be evident that the provisions of Section 6 of the act expressly prohibit the sale of power for the purpose of resale, despite which San Francisco is actually selling Hetch Hetchy power for the purpose of resale. In such circumstances there is, in my opinion, no possible conclusion other than that San Francisco is not complying, either absolutely or "reasonably", as specified in section 9(u) of the act, with the requirements prescribed by Congress. The Raker Act is clearly being violated.

III.

Although the chief interest in the past, as at present, has centered around the distribution of the power generated at the Moccasin power plant and delivered to the Pacific Gas and Electric Company under the contract of July 1, 1925, there is another phase of this question to be considered. The City and County owns and operates, as a part of the Hetch Hetchy project, the Early Intake power plant that is located, according to the records of the General Land Office, in the Stanislaus National Forest and is dependent on the grant contained in the Raker Act. This plant is of small capacity and was constructed early in the [175] development of the project primarily for the purpose of providing the electricity necessary for the construction of the remainder of the works. It appears that some power in excess of that required for the construction of the project was generated at this plant and that, by an order dated September 18, 1918, the Power Administrator for the State of California directed that the surplus be delivered to the Sierra and San Francisco Power Company to alleviate the power shortage occasioned by activities essential to the effective carrying out of the undertaking by the United States in connection with the World War. Pursuant to that order power from the Early Intake plant was sold to company named, and subsequently to its lessee,

the Pacific Gas and Electric Company, at the flat rate of one-half cent per kilowatt hour.

There is no written contract under which this power is sold to the Pacific Gas and Electric Company. From the facts reported, however, there appears to be no doubt that an absolute sale at a fixed price is effected. Nor does there appear to be any doubt that the power is resold by the company to its regular customers in the Tuolumne Circuit, which does not include San Francisco itself. Since the purpose of the sale of this power by the City and County clearly includes resale by the company for commercial purposes, it is manifest, on the basis of the prior discussion, that such an arrangement constitutes a violation of the statutory prohibitions in the Raker Act.

IV.

Although they are not necessary to the legal determination of the question whether the existing arrangements for the distribution of Hetch Hetchy power constitute a violation of the provisions of the Raker Act, and although I have already given and supported my opinion on that question, certain items in the legislative history of the act and certain facts attendant upon the performance of the contract of July 1, 1925, by San Francisco and the Pacific Gas and Electric Company have suffi-

cient general significance to justify calling them briefly to attention.

An examination of the legislative history of the act makes it manifest that Congress, in the enactment of section 6, meant to eliminate completely any private monopolistic control over the water or power produced from the Hetch Hetchy project, and that the Pacific Gas and Electric Company was specifically considered as one of the monopolistic concerns to be excluded. Of the numerous significant facts found in the legislative history only a few need be referred to here.

The Committee on Public Lands of the House of Representatives incorporated in its report (House Report No. 41, 63d Congress, 1st Session) a complete analysis of the bill which, with amendments not now pertinent, subsequently was enacted as the Raker Act. In commenting on section 6 of the Bill it was stated: [176]

> 'This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.' (p. 11)

This report and explanation of the bill was also included, by reference, in the report of the Committee on Public Lands of the Senate (Senate Report No. 113, 63d Congress, 1st Session).

A clear, concise statement in explanation of this section of the bill was made to the Senate by Senator Pittman, one of its sponsors before that body:

'It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly.' (Cong. Rec., vol. 50, p. 5478.)

Of particular significance are the statements made on the floor by Senator Norris in the course of an extended speech in support of the bill:

'* * * This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. To my mind, it is the very highest type of conservation. Here for ages this stream has been running down from the mountains, even destroying property, without doing man any good, and this proposition is to harness that power and to put it to public use not to give it to a private corporation. Why do we want to develop water power? Will we give it to the public or to a private individual or corporation?

Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have

or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.' (Cong. Rec., vol. 51, p. 343.)

* * * * * * *

'So we have a maze of corporations here. When you sum them all up you will find that they own practically all of the hydroelectric power of the State of California, and this bill, if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition.

[Quoting from a report of the Bureau of Corpora- [177] tions concerning the development of water power in California].

'(It will be recalled that the Pacific Gas & Electric Co. controls directly or influences nearly 200,000 horsepower developed and under construction and at least 100,000 horsepower undeveloped. But as large as these holdings are, that alone does not by any means give this company a monopoly of the water power in the territory served. There is undoubtedly a vast volume of undeveloped power in this region that is not owned by it. This lack of ownership of practically all the power in the territory where it operates has not, however, prevented the Pacific Gas & Electric Co. from establishing a fairly effective monopolistic market condition.

"'The operations of this company and its subsidiaries cover the north central portion of California for about 225 miles from north to south and 125 miles from east to west. This territory embraces at least 30 counties, containing about 38,000 square miles. San Francisco, the largest city in the State, Sacramento, and other important cities are in this territory.'" (Cong. Rec., vol. 51, p. 344).

* * * * * * *

'Mr. President, I could go on at great length if I were physically able to do so, and develop those propositions and trace down in detail those various corporations, but I think I have gone far enough to show that if the power of the Hetch Hetchy is developed it will come into direct competition with what a sworn official of the Government says it is a monopolistic control of the hydroelectric power of California.' (Cong. Rec., vol. 51, p. 345):

* * * * * * *

"* * * The people who ride on street cars, the people who use electric lights, the people who are now using gas, those who eventually will use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation or monopoly.' (Cong. Rec. vol. 51, p. 347.)

From these excerpts the intent of Congress is clear. Yet the Pacific Gas and Electric Company, now having a complete monopoly in San Francisco by reason of the acquisition in 1930 of the properties of the Great Western Power Company, receives the entire output of the Moccasin Power plant, which produces almost all of the power gener- [178] ated on the Hetch Hetchy project. Instead of competing with that power, the company has control of it. Consumers in San Francisco must purchase their power, whether or not it is Hetch Hetchy power, from the Pacific Gas and Electric Company. Even the City and County of San Francisco purchases from the company the power necessary for street lighting and other municipal uses.

It should especially be noted that the Pacific Gas and Electric Company, according to statements contained in its annual reports of 1930 and 1933 to the California Railroad Commission, expended some $45,500 in working for the defeat of the proposed bond issues submitted to the voters of San Francisco on August 26, 1930, and November 7, 1933. Had those bond issues been approved, Hetch Hetchy power, or a part thereof, would have been distributed by San Francisco itself in conformity with the mandate of Congress.

For the reasons stated in parts II and III hereof, it is my opinion that the provisions of

section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale.

I have been reluctant to arrive at this conclusion but I have no other option under the law and the facts. However, there are two methods by which San Francisco may follow the clear intendment of the law and at the same time enjoy all the benefits that would accrue to it under the Raker Act. A general bond issue to finance a distribution system may be adopted by a two-thirds vote of those participating in the election; or the charter of the city may be amended by a majority vote so as to permit the issuance of revenue bonds which will require the approval of only a majority of those voting at the election.

Who can doubt that, conscious of both its obligations and its opportunities under the Raker Act, San Francisco will rally under its splendid civic leadership as it has done so many times in the past and by its vote declare itself to be on the side of carrying out the solemn obligation with the United States Government that it undertook when it accepted the benefits of the Raker Act?

If the contract under discussion was ever justified as a measure of temporary expediency, that justification can no longer be pleaded in its defense, after such a lapse of time as this case disclosed. Nor can San Francisco be heard to

urge as an excuse for its continued failure to carry out a clear and binding obligation disabilities that the citizens can overcome if they have the will so to do.

(Sgd) HAROLD L. ICKES,
Secretary of the Interior." [179]

Counsel for the plaintiff thereupon offered in evidence a certificed copy of a letter dated August 24, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of San Francisco, transmitting to him a copy of the aforesaid Opinion. Said letter was received in evidence, marked

"U. S. EXHIBIT No. 12";

it reads as follows:

"The Secretary of the Interior, Washington,
August 24, 1935.

"My dear Mr. Mayor:

"I take pleasure in sending you herewith a mimeographed copy of my opinion in re the contract between San Francisco and the Pacific Gas and Electric Company in relationship to the Raker Act.

"Sincerely yours,
(Sgd) HAROLD L. ICKES,
Secretary of the Interior.

"Hon. Angelo Rossi, Mayor, San Francisco, California."

Counsel for the plaintiff then offered in evidence three documents, the first, a certified copy of a letter

dated March 11, 1937, from Harold L. Ickes, Secretary of the Interior, to the Board of Supervisors of the City and County of San Francisco; the second, a certified copy of letter dated March 16, 1937, from J. S. Dunnigan, Clerk of the Board of Supervisors of the City and County of San Francisco to Harold L. Ickes, and the third, a telegram dated March 30, 1937, from the Board of Supervisors of the City and County of San Francisco, (by Warren Shannon, President) to Harold L. Ickes, Secretary of the Interior. Said documents were received in evidence as one exhibit and marked

"U. S. EXHIBIT No. 13".

In the order in which they have been listed above, they read as follows:

"The Secretary of the Interior,
Washington, Mar. 11, 1937.

"The Board of Supervisors, City and County of San Francisco, City Hall, San Francisco, California.

Gentlemen:

I have been advised that on March 9 the electors of [180] San Francisco rejected Charter Amendment No. 1 which was designed to authorize the issuance of revenue bonds for the acquisition and operation of a municipally owned electric distribution system. It is my understanding that had that charter amendment been enacted the City and County of San

Francisco would have undertaken a program for the distribution of electric energy generated on the Hetch Hetchy project in accordance with the requirements of Section 6 of the Raker Act.

I have already advised you of my determination that San Francisco is now and for many years past has been violating the provisions of section 6 of the Raker Act by selling Hetch Hetchy energy to the Pacific Gas and Electric Company for distribution to consumers. Unless definite assurance can be given to me within 15 days after receipt of this letter that San Francisco will cease its violation of the provisions of the Raker Act, I shall refer this matter to the Attorney General of the United States with my request that appropriate action be taken in the courts to effectuate the provisions of the statute.

Sincerely, yours,

(Sgd) HAROLD L. ICKES,

Secretary of the Interior.

Copy to : Hon. Angelo J. Rossi, Mayor of San Francisco, City Hall, San Francisco, California.

John J. O'Toole, Esq., City Attorney for the City and County of San Francisco, City Hall, San Francisco, California."

"City and County of San Francisco,
Board of Supervisors,
Clerk's Office, Room 235, City Hall

March 16, 1937.

Honorable Harold L. Ickes,
Secretary of the Interior, Washington, D. C.

Dear Mr. Secretary:

Your letter March 11, 1937 re: Distribution of Power produced on the Hetch Hetchy Project, received March 15, 1937 and presented to the Board of Supervisors on that date.

The Board of Supervisors informs you that earnest and immediate attention will be given to the letter and you will be informed of the results at the earliest moment.

Respectfully,
Board of Supervisors, San Francisco.
J. S. DUNNIGAN,
Clerk." [181]

"March 30, 1937.

Honorable Harold L. Ickes,
Secretary of the Interior,
Washington, D. C.

Dear Sir: Referring to Your Letter March Eleventh Received by Board of Supervisors of San Francisco March Fifteenth Nineteen Thirty Seven Re Alleged Violation of Section Six of Raker Act by Disposing of Hetch

Hetchy Energy Through Pacific Gas and Electric Company for Distribution to Consumers and Advising That Unless San Francisco Does Not Cease This Method of Power Distribution You Will Refer Matter to Attorney General of United States With Request That Appropriate Action Be Taken in Court to Determine Whether Provisions of Raker Act Are Being Violated Board of Supervisors of San Francisco Does Hereby Request You to Proceed to Lay Matter Before the Attorney General With Understanding That the City of San Francisco Will Be Given Opportunity to Present Its Case Before Him This Board Believes That the Agency Contract Under Which City Is Now Acting Is Fully in Accord With the Raker Act and Believes That the Long Pending Controversy Can Best Be Determined by the Attorney General or by the Court This Message Is Sent You With the Hope That a Final Conclusion May Be Reached as to San Francisco Position With Regard to Its Compliance With Terms of the Raker Act.

BOARD OF SUPERVISORS CITY AND COUNTY OF SAN FRANCISCO
By WARREN SHANNON
President of the Board."

Counsel for the plaintiff thereupon offered in evidence a certified copy of a letter dated April 2, 1937, from the Secretary of the Interior to the

Attorney General of the United States requesting the commencement of the present suit. Counsel for the defendant objected to said letter upon the ground that it was incompetent, irrelevant and immaterial and self-serving and asked that, if it be admitted in evidence, it be limited to the sole purpose of showing that the Secretary of the Interior had requested the Attorney General to commence this suit. Thereupon, counsel for the plaintiff stated that the letter was offered to show a compliance by the plaintiff with the provisions of Section 9(u) of the Raker Act. The Court thereupon overruled the objection of the defendant and admitted said letter in evidence. Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are herein designated as Ruling and Exception No. 7. [182]

Said letter was marked

"U. S. EXHIBIT NO. 14"

It reads as follows:

"The Secretary of the Interior,
Washington,

April 2, 1937.

The Honorable The Attorney General.

My dear Mr. Attorney General:

On July 1, 1925, the City and County of San Francisco entered into a contract with the Pacific Gas and Electric Company, under which contract San Francisco has continuously since

that time delivered to the utility company almost the entire power output of the Moccasin plant on the Hetch Hetchy Project. The Moccasin plant is the primary power generating facility owned by San Francisco and operated in connection with its water and power project, known as the Hetch Hetchy Project, located largely within the Yosemite National Park and the Stanislaus National Forest. The project also includes a smaller power plant known as the Early Intake plant, the output of which is also delivered to the Pacific Gas and Electric Company under an informal and unwritten agreement.

San Francisco was granted the right to construct the Hetch Hetchy Project in the Federal areas involved by the act of Congress of December 19, 1913 (38 Stat. 242), commonly known as the Raker Act. In that statute numerous conditions are placed on the grant, among them being one which prohibits the sale of power generated by the grantee on the project for the purpose of resale by the purchaser, except in certain designated instances. That condition is contained in Section 6 of the act and is worded as follows:

"'That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the elec-

tric energy sold or given to it or him by the said grantee: * * *.'

Immediately after the execution of the contract of July 1, 1925, the question was raised as to whether it constituted a violation of the condition expressed in Section 6 of the act. The treatment of that question I need not state here: it is explained in detail in my opinion of August 24, 1935, two copies of which are attached. In that opinion I have also outlined the history of that question during the ensuing ten years, during which it was repeatedly raised and discarded. When the matter came to my attention, I determined that far too much procrastination had already existed and I notified the officials of San Francisco that a final determination of the question must be made. Pursuant to that notice, a formal hearing was afforded the officials of San Francisco and other interested parties by me on May 6, 1935. Thereafter various briefs and informal arguments were filed. After full and [183] detailed consideration of the statute, the facts and the arguments, I rendered my decision of August 24, 1935, holding that the contract of July 1, 1925, violated the provisions of the Raker Act as did the informal arrangement whereby power from the Early Intake plant was delivered to the Pacific Gas and Electric Company.

Thereafter the officials of San Francisco formally submitted for my consideration sev-

eral plans for future disposition of Hetch Hetchy power. After hearing and careful consideration, I ruled on April 22, 1936, that none of those plans would constitute compliance with the provisions of the Raker Act, although I indicated that an additional, unperfected plan informally submitted, if completed and effectuated, would apparently be in conformity with the statutory requirements. As a result of that tentative approval, the officials of San Francisco perfected what they designated as Plan No. 7, and on December 4, 1936, submitted it for my final consideration. That plan provided for acquisition of a distributing system by San Francisco and for municipal distribution of power direct to consumers. On December 16, 1936, I notified the city that, if effectuated, the plan would, in my opinion, constitute compliance with the provisions of the Raker Act.

To provide funds necessary to finance Plan No. 7, the Board of Supervisors of San Francisco presented to the electors a charter amendment authorizing the issuance of $50,000,000 of revenue bonds. On March 9 of this year the electors rejected that charter amendment. After receipt of information concerning the bond election, and on March 11, I wrote to the officials of San Francisco stating that I would request the Attorney General to institute suit to effectuate the provisions of the

Raker Act unless definite assurance were given within fifteen days from receipt of the letter that the violation of the provisions of Section 6 of the Raker Act would cease. I have received no such assurance, but, instead, I have received a telegram advising me that no action will be taken and that San Francisco desires the opportunity to test the matter in the courts.

In these circumstances, and pursuant to Section 9(u) of the Raker Act, I hereby request that you institute suit in the Federal Court to enforce the provisions of the act. In my opinion the least that can be done is to secure an injunction against the further disposition of power to the Pacific Gas and Electric Company under the existing arrangements between that company and the City and County of San Francisco.

Considering the importance of this matter and the undue length of time during which action has been deferred, I request that suit be instituted at the earliest possible date. This Department stands ready to render every possible assistance in the institution and prosecution of this litigation. [184]

For your assistance I am enclosing copies of the following documents in duplicate:

(1) Contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company. (The original copy of this document is in the hands of the parties to it.)

(2) Transcript of hearing held on May 6, 1935, concerning the legality of San Francisco's disposal of Hetch Hetchy power.

(3) Brief of City Attorney O'Toole supplemental to the hearing of May 6, 1935.

(4) Brief of Robert M. Searls filed on behalf of the San Francisco Chamber of Commerce and other organizations.

(5) The decision of August 24, 1935.

(6) Transcript of hearing held on January 28, 1936, concerning the newly submitted plans for distribution of Hetch Hetchy power.

(7) Brief of City Attorney O'Toole supplemental to the hearing of January 28, 1936.

(8) Decision of April 22, 1936, rejecting the plans formally submitted and considered in the hearing of January 28, 1936.

(9) Plan No. 7, the letter submitting the plan and my letter approving it.

(10) My letter of March 11, 1937, allowing fifteen days in which to give assurance that the violation of the provisions of the act would cease.

(11) Telegram received March 30 advising that San Francisco desires a test of this matter in the courts.

Sincerely yours,

HAROLD L. ICKES

Secretary of the Interior."

W. G. VINCENT,

a witness for the plaintiff, was thereupon duly sworn and testified as follows:

Direct Examination

I am Vice-President and Executive Engineer of Pa- [185] cific Gas and Electric Company. I am familiar with the terms of the contract ("U. S. Exhibit No. 6") between our Company and the City and County of San Francisco, which provides for the delivery of a certain quantity of electric energy developed by the City in its Moccasin Power Plant to our station at Newark, I, myself, have not, since the inception of the contract, been in charge of seeing whether or not the terms of the contract were carried out. I have not been in direct charge of the matter at any time, although I am familiar with the general conditions of the delivery of electric energy under the contract. I know in a general way what has been done by our Company and the City under the contract, from the records of our Company and my familiarity with the matter since the contract was executed, but I have not followed the details of the operation. At the present time, the power generated by the City at the Early Intake Plant is being turned over to our Company in addition to the power generated by the City at the Moccasin Plant and contemplated in the contract. The power gen-

(Testimony of W. G. Vincent.)

erated at the Early Intake is a little less than three per cent of the power generated at the Moccasin Plant. The power from the Early Intake Plant is being paid for by our Company under the same terms as those prescribed in the Contract.

There is no way in which our Company can distinguish between the power from the Early Intake Plant delivered to it at Newark, and that from the Moccasin Plant delivered to it at Newark, except in the matter of quantity. All the power from the Early Intake passes through the Moccasin Creek Power Plant; all the power is delivered to us together. I am not familiar with the maps which you show me ("Defendant's Exhibit A") and "U. S. Exhibit No. 5"), but I can give a general statement of the Hetch Hetchy Project with its power plants and transmission lines, aqueducts and so forth.

The water is stored in the main reservoir of the City and County of San Francisco, in the Hetch Hetchy reservoir indicated in red on "Defendant's Exhibit A". Also, there is water stored in Lake Eleanor. The water from the Tuolumne River flows along here as shown on the map. (Defendant's Exhibit A"). The water released from the storage reservoir flows down the river to a point designated as "Early Intake". At this point, the water enters the aque-

(Testimony of W. G. Vincent.)

duct system of the City and flows through tunnels to the forebay or regulating reservoir at the end of the tunnel above the power house. The power house is downhill from the reservoir. The Moccasin Creek Power Plant is shown here on the map ("Defendant's Exhibit A"). The power is generated at the Moccasin Creek Power Plant and sent out over a two-circuit steel tower line at 110,000 volts pressure to the Newark substation of the Pacific Gas and Electric Company, which is located about 40 miles from San Francisco. The Early Intake Power Plant is located at the point on "Defendant's Exhibit A", which is marked "Early Intake." My understanding is that the water [186] used through that plant is the water diverted from Cherry Creek and released from the Lake Eleanor Reservoir. That power is generated at the Early Intake Plant and brought down over a transmission line of the City to the Moccasin Creek Plant. From that point it is transmitted to Newark over the same circuits that carry the power generated from the Moccasin Creek Plant.

The power from the Early Intake passes through the Moccasin plant and thence on to Newark and there is no way of differentiating it from the power generated at the Moccasin plant except in the matter of quantity.

(Testimony of W. G. Vincent.)

All the power delivered by the City of Newark is measured before it passes on to the Company's bus bar for distribution into our pool. In a general way it is correct to state that all the different demands we have throughout the state; all the different places we sell or distribute power, are so connected that our power distribution is one large pool, and that all power supplied from any source including the Moccasin power goes into that pool, except that physically the pool is not centered at Newark or any one place. The pool is not a pool in the sense that all the power comes in at any one place; power comes in and is used at various points on the line and there is no one place where all the power is centered or passes through. With reference to demand, the power that passes into the pool is regulated by our load dispatcher, who is in touch with the power supply at all times and with the demands made upon that supply.

The electric system of the Pacific Gas & Electric consists of a network of high-voltage transmission lines, and also low-voltage transmission lines, all of which, as a system proposition, are inter-connected and operate as a unit. These lines extend from Bakersfield, on the south, to Delta, north of Redding. The Pacific Gas & Electric Company has many sources of power other than its own plants

(Testimony of W. G. Vincent.)

and the Moccasin Creek plant, such as power purchased from various companies, and power from the irrigation districts which feed into that network of high-voltage transmission lines, and all of its power system is operated as a unit, under a load dispatcher in Oakland, who is constantly in touch with the power plants as the source of power on the system, and as the requirements of the load vary, the load dispatcher controls the supply of power to that network of high-voltage lines by connecting up more plants, or increasing the load on plants which are already supplying power, and in that way he keeps the balance between the requirements and the amount of energy being supplied into the transmission network.

In the contract of July 1, 1925, it is provided that delivery of power from the Moccasin Creek plant shall be made at a monthly load factor of 75 percent. The method of control by the company of the output of power from the Moccasin plant differs from its control of the power received from other plants in this respect. [187]

In other words, we regulate our own plants in accordance with their capacity, but under the contract, the Moccasin Plant is regulated in accordance with a seventy-five per cent monthly load factor. In Company operated

(Testimony of W. G. Vincent.)

plants there are no load factor restrictions as to operation.

The power that comes to the station at Newark is measured by meters installed at Newark before it passes into the pool and it is upon the meter readings that the City is compensated by our Company for the power delivered at Newark. The reading of the meters is governed by the amount of the power that comes over the line to them, which, in turn, is governed by our load dispatcher within the limitations of the contract, and by the city's operating conditions which may obtain at the time in the plant. After the power passes through the meters and is measured, it goes into the 110,000 bus bar, at Newark. From that time there is no method of differentiating the power received from the City from any other power supplied by that particular line.

We do not bill our customers in San Francisco as having received power generated by the City at the Early Intake Plant or the Moccasin Power Plant. We have no means of identifying the source of the power. Our San Francisco customers are billed under the name of Pacific Gas & Electric Company, the same as our municipal customers elsewhere. Our account with the City is based entirely upon the meter readings at Newark, as the contract provides. The City, itself, is a customer of our

(Testimony of W. G. Vincent.)

Company. There is no differentiation between the City and any other municipal consumer or municipal corporation consumer with respect to the energy supplied to it. The City is billed for the power just as any other municipal consumer is billed and the rate it pays is fixed on the same basis as that paid by any other municipal corporation consumer.

I am familiar with the provisions of paragraphs 4 and 5 of the contract of July 1, 1925 ("U. S. Exhibit No. 6") wherein it is stated that it is assumed that the average revenue received by the Company from consumers in San Francisco during the year 1924 was 2.383 cents per kilowatt hour and that the City shall receive for the energy consigned and delivered by it, to the Company, at Newark, 26.935% of 2.383 cents per kilowatt hour. The figure 2.383 is the average revenue per kilowatt hour for all electric energy sales of the Company in San Francisco in the year 1924.

I am familiar with paragraph 8 of the contract of July 1, 1925. I have prepared a computation of the revenue per kilowatt hour of the Company in the City and County of San Francisco on an annual basis for each year since the contract was entered into up to and including the present year, which includes an estimate of what the revenue will be for the present year based upon our past experience

(Testimony of W. G. Vincent.)

on the established rates: For the year 1935, the average revenue of the Company per kilowatt hour [188] was 2.361 cents; for 1936, 2.238 cents; and for 1937, with three months' estimated, will be 2.113 cents. In the three years mentioned, beginning with 1935, through 1936 and ending with 1937, each year has shown a lesser average revenue per kilowatt hour in San Francisco, than the preceding year and for each of the three years, the average return was less than the rate of 2.383 cents used in the contract of July 1, 1925 as the basis of return to the City.

In each of the three years 1935, 1936 and 1937 there have been reductions in the established rates of the Company for the sale of electric energy in San Francisco. There was temporary reduction in 1935; a permanent reduction in 1936, and a permanent reduction in 1937. The reduction in 1935 was only for the use in excess of the previous years' use without making a definite change in the schedule. In 1936 and 1937 there was a definite lowering of the schedules.

The temporary reduction in 1935 was $300,000.00 in San Francisco. In 1936, the reduction approximated $1,200,000.00 and in 1937 will approximate $1,213,000.00. I have not made any computation of what the difference in return to the City would be on the basis of

(Testimony of W. G. Vincent.)

2.361 per kilowatt hour (which was the average return of the Company for the year 1935 in San Francisco) and the figure of 2.383 (which is used in the contract of July 1, 1925, as the basis of return to the City under the contract) nor have I made any such computation for the year 1936 in which the average revenue per kilowatt hour received by our company in San Francisco was 2.238 as against the figure 2.383 used in the contract. I have not here any computations showing what the difference in the return to the City contemplated under paragraph 8 of the contract would have been, if instead of using the figure 2.383, as used in the contract, we had used the figure 2.361 for the year 1935; the figure 2.238 for the year 1936, and the figure 2.113 for the year 1937. There has not been any difference in the compensation paid to the City as the result of the three successive rate reductions in the years 1935, 1936 and 1937.

The amount paid to the City under the contract of July 1, 1925, is a product of three factors which are set up in the contract; the average rate of 2.383 cents per kilowatt hour is one factor; the 73.065 per cent of the revenue, retained by the company is another factor, and the estimated loss of 24 per cent specified in the contract is the third factor. The money received by the City is the product of these

(Testimony of W. G. Vincent.)

three factors, the average rate per kilowatt hour multiplied by 76 per cent, and by 26.935 per cent which the City is to receive. Any readjustment of one factor would necessarily bring up the question of a readjustment of the other two factors.

The contract is subject to cancellation on 24 hours' notice by either party. It is a temporary contract. A contract of that nature is not a permanent contract. If [189] one party wants consideration of one factor favorable to it the other party would certainly want a consideration of the other factors, unless they were bound by those particular factors for a term of years.

I think the contract has been enforced except for that technical provision in paragraph 8 (of the contract) relative to the use of the Company's average revenue per kilowatt hour, as the basis of the return to the City.

I think it is correct to say that in the year 1936 the difference between the average revenue per kilowatt hour actually received by our Company and that set up in the contract would have effected a change in the amount paid to the City of better than five per cent of that amount. That is to say, if we had used the figure 2.238 as the basis of return rather than the figure 2.383 as set up in the contract, the difference in the return to the City would have

(Testimony of W. G. Vincent.)

amounted to about five per cent or near $100,000.00. For the year 1937 the difference would be better than eleven per cent, because the figure of 2.113 is more than eleven per cent less than the figure 2.383 which is the basis upon which payment is being made under the contract. For the year 1937, therefore, the difference would amount to about $200,000.00. There has been no change in the base, however. The City is still being paid on the basis of 2.383, as the average return per kilowatt hour received by the Company in San Francisco. Apart from the rates charged to consumers, as established by the Railroad Commission, no control is exercised over our company's distribution of the energy consigned by the City to it at Newark, so far as rates, consumers, places of use, or anything of that sort is concerned.

Cross Examination

We have a line connecting close in to the Early Intake Plant, whether at Groveland or not, I don't know. I know that we took the power from the Early Intake Plant directly from a local line through there. I am not now familiar with the conditions as they existed during the construction of the Hetch Hetchy project. My information, however, is that the Early Intake Power was delivered into the Sierra and San Francisco Power Company's

(Testimony of W. G. Vincent.)

system beginning in 1918 over a line which belonged to us at that time. I do not know whether that power comprised all the power generated at Early Intake or only a surplus. We had no connection with the San Francisco Power Company in 1918. It was a short line that came from the Early Intake and we were negotiating to sell it to Sierra and San Francisco Power Company. I don't know what the conditions were at that time. Of the total amount of power received by our Company from the City's line at Newark approxim-

[190] ately three per cent comes from the Early Intake Plant. I do not know what prior uses the City makes of the power from the Early Intake Plant. I only know how much of the power we receive from the City at Newark comes from Moccasin Power Plant. It is my information that about 13,000,000 kilowatts came in 1936 and a little under 12,000,000 until October of this year.

The San Francisco load taken from the Newark sub-station is always more than the total contract requirements on the seventy-five per cent load factor at the present time. The Moccasin Creek Power and the Early Intake power comes from the City's line to our bus bar at the Newark station. From those bus bars we have four 100,000 volt lines that go direct to San Francisco and under normal oper-

(Testimony of W. G. Vincent.)

ations at every instant of time, the amount of power being drawn into San Francisco exceeds the amount being delivered to us by the City. Bus bars is an electrical term for copper bars fed by a number of circuits. A number of circuits take power off the bus bars. The amount of power going off of the bus bars to San Francisco is more than the amount of power than comes on to the bus bars from Moccasin Creek, in normal operations.

The quantity of electric energy which the Pacific Gas & Electric Company delivers to San Francisco consumers' meters is always more than the amount which the City turns in to the Pacific Gas & Electric Company under the terms of its contract. So far as quantity goes, the Company could deliver all the energy that the City produces at Moccasin Creek and still have to supply more energy from its own source in order to meet the consumers' demands in San Francisco.

The City of San Francisco consumes a certain amount of electrical energy in its municipal railways and for lighting streets and public buildings.

The energy brought in from the 110,000 volt lines from Newark goes to two sub-stations just outside the City limits of San Francisco, where it is converted through transformers, that is transformed and regulated to a lower voltage of 11,000 volts. At 11,000 volts, it is

(Testimony of W. G. Vincent.)

distributed to some 18 sub-stations in San Francisco, through 11,000 volt lines largely underground, and in those sub-stations it is then transformed into lower voltage and sent out through distributing lines to the city. It is converted to direct current of 500 volts for Municipal Railway use. For street lighting it is converted to different voltages by various equipment in the sub-stations and sent out over the street lighting circuits.

Unless we billed this current to the City, separately, we would have no way of accounting for these changes in characteristics and the line losses and everything else. [191] We could not say that any particular energy came from Newark and then account for changes in its characteristics until it got to the City meters, in San Francisco. I do not think you could practically trace the particular amount of energy from sales to consumers or to the effect of the changes in characteristics. We would have to bill it as current having the characteristics of our San Francisco energy. In respect to the matter of accounting convenience and billing it would certainly be more confusing to try to make adjustments with the City's billing schedule on account of the power received at Newark than to bill the City as we do.

The contract between the City and our Company is a day to day contract, terminable on

(Testimony of W. G. Vincent.)

twenty-four hours' notice from either party to the other.

Under the contract the return to San Francisco is computed as follows:

The amount of energy which the city delivers to us at Newark is multiplied by 76 per cent; that allows for the loss of 24% from Newark to San Francisco, and to the consumers' meters as set forth in the contract; so, multiplying the number of kilowatt hours received at Newark by 76 per cent, gives us the number of kilowatt hours that we estimate that the ompany delivers for the city's account to the consumers' meters. Then we multiply that number of kilowatt hours by the average rate of 2.383 received by the company in San Francisco, which produces an amount of money, of which the company retains 73 per cent and gives the City 27 per cent.

The 73 per cent plus retained by the company covers the cost to the company in transporting the power from Newark to San Francisco, which it does over its own line, in converting the power at the limits of San Francisco to lower voltage, in distributing power through San Francisco to its cable system, and then to the sub-stations, and out to the distributing line to the consumers' meters; for the operations of this system, the maintenance of this system, a reasonable return of compensation for the use

(Testimony of W. G. Vincent.)

of the property, and also for supplying steam standbys and peak load service in connection with the San Francisco load, because the city energy is only about one-half of that required to supply the San Francisco load. The energy which is delivered at Newark is not sufficiently reliable to serve a community like San Francisco, so the company maintains steam plants which are ordinarily known as stand-by plants. These plants serve two functions; one is to supply energy at times when there may be a break in the transmission line coming in, or some accident to the power plant, and the other function is to supply power at times when the demands in San Francisco, in other words, what we call the "peak load", are in excess of the incoming power over the transmission system. In the evening, in the winter time, about five o'clock, everybody starts turning [192] on the lights and we have what is called a "peak load", and in San Francisco at the present time, the peak load would be about 225,000 kilowatts. Now, the maximum amount of power we can receive here from Moccasin Creek is about 67,000 kilowatt hours, so that the additional power must be supplied by the company. These are the services which the company renders in supplying and distributing this energy for the city.

(Testimony of W. G. Vincent.)

I include the cost of billing the consumers and collecting bills in the cost of operation and maintenance of the system, in which I include all the costs incident to the operation of the system, including reading meters; billing, collecting and accounting and operations of that character which go along with the supplying of energy to the consumers.

In response to a question by Mr. Licking, on direct examination, I stated that in the last three years there has been a reduction to 2.361 in the average rate of return to the Company in San Francisco, and that that figure is .022 cents per kilowatt hour less than the average return of 2.383 used in the contract, as the basis of return to the City. I, also, stated that this difference amounted to a five per cent reduction. I desire to correct that testimony. In giving it I was a little bit confused as to what year the five per cent applied to. I think my calculation was that it was ten per cent or eleven per cent in 1936. It was one per cent in 1935 and ten per cent in 1937.

I have recomputed the percentages for the three years; for the year 1935 I now make the return one per cent below that specified in the contract as the average rate of return; for the year 1936 I now make it as six per cent below the average return specified in the contract, and for the year 1937 I now make it eleven per

(Testimony of W. G. Vincent.)

cent below the average return specified in the contract. For the three years there would be an average of six per cent below the average return stated in the contract.

A change in the rate established by lawful authority for the sale of electric energy in San Francisco does not necessarily affect the average return per kilowatt hour, that our Company receives from the sale of energy in San Francisco, because there may be a shift in the relative proportion of energy sold at different rates. In other words, if the rates are reduced, say, five per cent, and during the following year there is less energy sold in proportion at the lower rate, like railway power and heavy industrial power, and a big increase in domestic and commercial use, at the higher rate, then our average revenue per kilowatt hour may be greater than at the higher rate. I might illustrate that in this way: If a shoe merchant were selling two kinds of shoes, one at $10 and one at $5 a pair, and he sold an equal number of [193] pairs of each class, then his average income per pair of shoes would be $7.50. If, however, he reduced the price of the shoes to $9.00 and $4.00, respectively, per pair, and sells three times as many pairs of the $9.00 shoes as he does of the $4.00 shoes he will get an average of more than $7.50 per pair, notwithstanding that he has reduced their prices.

(Testimony of W. G. Vincent.)

If we have a change during the years 1935, 1936 and 1937 amounting to an average of six percent over the three-year period it does not, necessarily, follow that that reduction was the result of reductions in the rates established by legal authority. It might have resulted from shifts in the quantity of electricity taken at different rates. I do not know what the fact is in this regard for the years 1935, 1936 and 1937. I have not traced that through.

There were reductions in rates made in 1936 and 1937. Just how far these reductions in the established rates made in the years 1936 and 1937 were responsible for the decrease in the average return per kilowatt hour to the Company in those years, and how far these reductions were accentuated by shifts in the proportions of electricity taken at different prices, I am not prepared to say.

I do not know whether shifts in the proportions of the amounts of electricity sold at different prices by our Company in San Francisco, in the years mentioned, had anything to do with the failure of our Company to change the basis of accounting to San Francisco under the contract of July 1, 1925 or was a factor taken into consideration in that regard. Somebody else in the Company has charge of the accounting.

(Testimony of W. G. Vincent.)

From August 1, 1925 to the end of December, 1937, estimating the three months of the year still to run, the average revenue of our Company from the sale of electric energy sold in San Francisco was 2.381 cents per kilowatt hour as compared with 2.383 cents per kilowatt hour used as the return base in the contract of July 1, 1925. This is a difference of less than one-tenth of one per cent and I would say that over the twelve-year period that the contract has been in effect, it would amount to approximately $26,000.00. In stating that figure I mentally estimated that the total amounts paid to the City under the contract have been about $26,000,000.00 and one per cent is about $26,000.00.

Q. Would you define to his Honor what is meant by the term "load factor"?

A. A load factor is a term quite frequently used in engineering discussions and investigations and technically it means the relationship of the average load to the maximum load. We speak of a plant running at 50 per cent. or 75 per cent. or 100 per cent. load factor. If it runs at 100 per cent. load factor it means it is running at full load continuously all the time. If it runs at 50 per cent. load factor that means that it averages 50 per cent. of its full load; it may run its full load part of the time [194] and be shut down part of the time, but on the

(Testimony of W. G. Vincent.)

average it runs at 50 per cent. or half of its full load. By 75 per cent. load factor we mean that it is running on the average at 75 per cent. of its full load. It may run certain hours 100 per cent., other hours zero, other hours, 10 per cent., and so on. There is another way of looking at it. A plant may run on an average of 75 per cent. load factor, if in one day of 24 hours, it runs at 100 per cent. of its load for eighteen hours, (three-quarters of the twenty-four), and then shuts down for the day—in such a case it would be operating at 75 per cent. load factor. The load factor in operation of a power plant is important in economics, particularly as to the plant, because the plant represents a substantial investment, and you want to work your investment as much of the time as possible. You put a plant in and operate all the time at full load capacity, if you can. Then your output is lower in cost than if you just operate it half its capacity. In fact, with hydro plants the fixed charges and operating costs are practically fixed without regard to the amount of load you turn out, so if you can operate a plant at 100 per cent. load factor, the cost per unit would be just half of what it would be at 50 per cent load factor. A steam plant is slightly different because you have the fuel element that comes in as part of the operating cost, so that in the engineering depart-

(Testimony of W. G. Vincent.)

ment, the economics of it, we try to arrange to operate our plant to as near capacity as possible. Our system load factor is about sixty-three per cent.

The San Francisco load factor, that is the load factor of the requirements of the consumers of San Francisco, is between forty-five and fifty per cent. In other words, the average demand of the people in San Francisco, during the course of the year is about forty-five per cent of their peak or maximum demand so that if you had a plant in San Francisco it would be operated at a forty-five or forty-seven per cent load factor, if you had to operate it under city conditions only.

Redirect Examination

There was a $300,000.00 rate reduction in 1935, a $1,200,000.00 rate reduction in 1936, and a $1,213,000.00 rate reduction in 1937. The last two of these three reductions were cumulative, that is that there were successive reductions in different schedules. This does not apply to the 1935 schedule. With these various drops in the established rates there were coincident drops in average return to the Company. I do not know just what influence the changes in rates had upon the drop in the average net return to the Company. I have not traced through the shifts in classification. I

(Testimony of W. G. Vincent.)

do not mean to testify that the lowering of the rates would not have any effect on the decline on the average revenue per kilowatt hour. I think that probably part of the declines were due to the rate reductions. I have not traced them through, but the probabilities are that that is the fact. I should say that the major part of the re- [193] duction in the average revenue per kilowatt hour to the Company reflected in the years 1935, 1936 and 1937 was caused by the lowering of the established rates.

Our Company has one control station in Oakland which controls our purchased power, our consigned power and the power developed at our different hydro electric plants, all commingled. The control which our load dispatcher maintains over all of this energy is not based upon the fluctuation and demand of Oakland, San Francisco, Berkeley or San Jose, taking any of them separately. Primarily it is based upon the fluctuation in the entire power demand and not upon the demand of San Francisco or any other city.

Relative to the control of the energy from the Moccasin Creek Plant, that control is based in part upon the fact that we are obligated to take that energy at a seventy-five per cent load factor. When I said that what the load dispatcher controlled "primarily" was our entire

(Testimony of W. G. Vincent.)

power demand, I meant that the load dispatcher tries to meet the load conditions of a system from the power reserves available to him in dispatching the load, but he has a greater limitation on that. Various plants have to have certain loads on them and require a certain power produced, and he has not entire freedom in that respect. He is limited by the limits of contractual obligations whether available in different plants, etc. One of the limitations is the provisions of the contract with San Francisco with respect to the operation of its plant.

Our reason for operating a whole system in a single pool is based upon economy of production. We had a peak this year of nearly a million kilowatts on our peak load. Now, the Moccasin Creek produced about 73,000 or 74,000 kilowatts which is just part of the source of the power that comes into our system at Newark. I don't know into what general area the electric energy goes after it comes into the pool at Newark or what communities, outside of San Francisco, receive it. As I said this morning, the power being brought to San Francisco from the bus bars at Newark, into which the Moccasin Creek energy is supplied—the power coming into San Francisco is, under normal conditions, at all times greater than the amount coming into the bus bars at Newark from the Moccasin Creek plant.

(Testimony of W. G. Vincent.)

The Newark station is the main source of the energy coming into San Francisco. Some power comes from bay cables in Oakland. Our control station is in Oakland. Apart from San Francisco, the Newark station supplies all of the peninsula area down to San Jose.

Counsel for the Government did not understand correctly a part of my testimony. I do not recall testifying that the company sold the power received from the City on or for the account of the City. What we pay the City is based upon the electric energy delivered at Newark and not on the basis of any subsequent delivery of power by the company to consumers. [196]

Recross Examination

The formula upon which the basis of return to San Francisco is computed takes into consideration three factors, transmission loss, the company's average revenue per kilowatt hour, and the 73 plus per cent. which the company retains. The basis of computing the amount due the city is the kilowatts per hour delivered at Newark and multiplying it by 76 per cent., which automatically subtracts 24 per cent. for losses, and then multiplying that figure by 2.383, and then multiplying that figure by 27 per cent., which determines the amount paid the city.

(Testimony of W. G. Vincent.)

When I say that a computation is based upon the delivery at Newark, I mean that the quantity of energy for which we account to the city is measured at Newark and that all of the other factors have to be applied to that amount before we determine how much in dollars and cents is co...ing to the City.

The Government here rested its case in chief.

Defendant's Case

R. B. HANSEN,

a witness for the defendant, testified as follows:

I am a civil engineer with the Public Utilities Commission of the City and County of San Francisco. As such, I am engaged in working involving lands and rights of way belonging to the Hetch Hetchy project and the preparation of maps showing the same. I have worked on the preparation of deeds by which we obtained our rights of way. I am familiar generally with the territory in the country which is comprised within the Hetch Hetchy project. I have worked on that project about ten years, both in the office and in the field. I am familiar with the map marked "Defendant's Exhibit A". It was prepared under my supervision in the office of the Hetch Hetchy Water Supply. It was made up entirely from our office records

(Testimony of R. B. Hansen.)

and is a correct reproduction of the several and various maps which we have in the office of the Public Utilities Commission and which are under my control and jurisdiction. The first legend on the map is entitled "Aqueduct Right of Way in Public Land". This means the right of way that the City got from the Government under the Raker Act. The land shown on the map in green and in purple represents land the City got from the Government under an application under the terms of the Raker Act. The portion colored in green on the map represents the portion of the lands which have been actually used for construction. The portion colored purple on the map represents the lands that will be used for future or proposed construction. In short, the land shown in green and in purple on the map represents all the land the City got from the Government to be used for aqueduct rights of way. The lands shown in red on the map comprise the aqueducts, [197] rights of way over patented land; that is land not obtained from the Government, but obtained by the City from the owners thereof. The map, also, shows the transmission line rights of way. These are colored in the same manner as the aqueduct rights of way, that is the portion shown in green and purple are the transmission line rights of way which the City got from the Government under the

(Testimony of R. B. Hansen.)

terms of the Raker Act and the portion shown in red, are the transmission line rights of way obtained by the City generally from private parties. The same colors have been used to show the railroad rights of way, that is the green represents the rights of way received from the Government upon application, and the red lines show the rights of way purchased from private parties, the situation being that certain areas which formerly were part of the public domain had been acquired by individuals under patents before we wished to acquire our rights of way.

The second item shown by the Map is lands conveyed to the United States of America by the City and County of San Francisco. These lands are shown in yellow on the Map and comprise about 1700 acres. They were purchased by the City from private parties and were given back to the Government. They are not any portion of the land that we originally got from the Government, but are lands we bought from private parties and gave back to the Government. That just about covers the color scheme of the map which, also, shows the boundaries of the Yosemite National Park and Stanislaus National Forest, and, as indicated, shows the lands or rights of way obtained from the Government by the City under all of its applications under the Raker Act. In order

(Testimony of R. B. Hansen.)

to describe the Hetch Hetchy project and how it operates I will start at Hetch Hetchy. At the present time we have a dam located at this point which has an ultimate flow line as shown by the green outline; in other words, this line, here, represents the ultimate flow line of this dam. At Lake Eleanor we also have a dam on Eleanor Creek at the location shown on the map. The flow from Hetch Hetchy dam flows down Tuolumne River to Early Intake. The flow over the Eleanor dam flows down Eleanor Creek and into Cherry River, and also reaches Early Intake. At Early Intake we have the power house, which was mentioned this morning, and at that same point we take the water into our tunnels, and it flows through our tunnels down to a regulating reservoir at Priest, which is shown right here (indicating) on the map; from Priest Reservoir the water flows down a penstock into Moccasin Power plant, and into Moccasin reservoir. From Moccasin reservoir it enters another tunnel and is carried down by a siphon which we have under the reservoir and then into another tunnel and so on to San Francisco. [198]

At this point the Court adjourned until Wednesday, October 20, 1937, at ten o'clock A. M.

(Testimony of R. B. Hansen.)

Wednesday, October 20, 1937, 10 o'clock A. M.

(Direct Examination of R. B. Hansen resumed)

I have examined the Maps marked "Exhibit C" which are attached to the plaintiff's complaint in this action, and purport to show the lands covered by the various applications made by the City and County of San Francisco to the Federal Government and grants and rights [199] under the Raker Act and have compared the lands shown on said maps with the actual lands which the City has received from the Federal Government. The map agrees very well with our office records showing the lands which the City has received from the Government.

I have made a study to compare the lands shown on the map as having been covered by applications of San Francisco with our records showing the lands which we actually received from the Government. Certain of the lands which we applied for we received from private parties to whom they had previously been patented. These are shown in red on the Defendant's "Exhibit A".

As a good example, take the right of way between the Early Intake and Priest, we have a strip of land on which we have both aqueduct and transmission lines. The portion of this land that we got from the Government over unpatented lands is shown in green, and the portion that we got over patented lands is shown

(Testimony of R. B. Hansen.)

in red. The application maps cover the entire strip.

The red strip shown on the map across Section 16, (that is between Early Intake and South Fork) was acquired by the City from private owners; following along you see a repetition of the same situation, as shown by the areas colored in red, all of which represent rights of way acquired from the owners of patented lands. I have made a calculation as to the number of cases where rights of way and easements were obtained from private individuals and not from the Government only in so far as was necessary in the preparation of "Exhibit A". We dug out of our office records each instance in which we dealt with patented lands and platted those things on the map and colored it in red. All of the lands shown on the map in yellow, which I have testified represent lands that we returned to the Federal Government, were acquired from private individuals who had acquired patents to the lands from the Government. The lands so acquired from private owners and returned to the Federal Government amounts to 1698.36 acres.

JOSEPH JAMES PHILLIPS,

a witness for the defendant, being duly sworn, testified as follows:

I am Director of property for the City and County of San Francisco and have occupied that position since January 8, 1932. Prior to that time my position with the City was Chief Right of Way Agent for the Hetch Hetchy project which position I held from August, 1915 to January 8, 1932. I am familiar with the properties of the Hetch Hetchy project.

In connection with the project, I personally handled all of the purchases of property in the Mountain Division which were necessary in the project, and either personally [200] purchased or caused to be purchased under my direction all of the property required by the Project in the State of California.

The acreage given by the United States to the City and County of San Francisco is shown upon "U. S. Exhibit No. 5" which I have adopted as correct, notwithstanding there are some discrepancies between the acreage and the mileage shown on the Maps, included in this Exhibit and our records. These discrepancies are of a minor nature and for that reason I have disregarded them in order to give the value of that land.

Mr. Hennessy: I object to the value. He was not asked for the value. We are not concerned with the value.

(Testimony of Joseph James Phillips.)

The Court: You are asking as to value?

Mr. Holm: Yes. [201]

The Court: Indicate for the record the purpose of your offer, so that we will have a record.

Mr. Holm: The purpose of our offer is this, that we desire to show the equities existing between the United States Government, on the one hand, and the City and County of San Francisco, on the other. We desire to show, briefly, what the project consisted of, what contributions have been made by the United States Government, on the one hand, and what contributions have been made by the City and County of San Francisco, upon the other hand. And we desire to acquaint the court with those very facts so that the Court can then determine in its mind where the equities lie as between the controversies existing as set forth in the pleadings before your Honor now. We wish to show, in brief, that the lands contributed by the United States Government for the construction of this project were in the form of reservoir sites consisting of approximately 2580 acres; that is subject to change in figures by the testimony possibly of this witness. And we desire to show that as of the date of the acquisition of that reservoir site, the value of it, as we have set forth in our Answer. We want to show the total acreage of patented lands acquired by the de-

(Testimony of Joseph James Phillips.)

fendant located in said reservoir sites and necessary for use in connection with said reservoirs was 1545 acres, for which we say the City and County of San Francisco paid a sum in excess of $400,000. We want to show the total mileage of aqueduct rights of way granted by plaintiff to defendant under the terms of said Act, was a certain number of miles, and what the fair market value of that equity was, that it amounted to a very nominal sum, say in round figures $3000. These figures that I am giving your Honor are all subject to change by the witness, who, I hope, will be able to testify. We also wish to show the total mileage of aqueduct right of way purchased by the City and County of San Francisco for the very purpose of helping to develop this hydroelectric power that is under consideration by the Court at the present time, costing the City and County of San Francisco in excess of a million dollars. [202]

We also wish to show that the total value of the roads, trails and temporary rights of way for construction of railroads granted by the Government to the City and County of San Francisco as of the date of the grant did not exceed possibly $3500. We wish to show that the value and the cost in actual money contributed by the City and County of San Francisco for the construction of roads, trails and

(Testimony of Joseph James Phillips.)

camp sites and similar matters which we were called upon to supply to the Government under the terms of the Raker Act was approximately $1,761,000, all of which has inured to the benefit of the United States Government, and they now own those roads and trails and they have them in their possession, to be used by the people of the world, whoever may go there and visit in that Valley. Those are some of the things, and, briefly, about all of the things that we desire to show by this particular witness, and it will be done, if your Honor please, inside of ten minutes.

Mr. Hennessy: We object to that offer upon the ground that this evidence is absolutely immaterial, irrelevant, and incompetent, and not within the issues of this case, and it is not admissible upon any theory; not admissible upon the theory of estoppel, it is not admissible upon the theory of balance of convenience under those cases cited to your Honor, and there is no question of equities involved in this case. It is a simple case as to whether or not there has been a violation of the covenants in the statute and for those reasons we insist upon our objection.

The Court: The Court indicated last evening before adjournment that the general rule applied here, that it did not come within the exception either in the argument or in the show-

(Testimony of Joseph James Phillips.)

ing made. However, I indicated following that I would allow the widest latitude on both sides from the standpoint of the record, so when this record reaches some other court it will be clear what the issues were, and you would have a record. Now, you have also indicated this would take a short period of time and the Court will allow the testimony over the objection of the United States, subject to a motion to strike.

The Witness: I have not finished my answer, but the answer briefly was—I have examined the maps filed by the Government in this case, and while there were some discrepancies I found the figures to be fairly accurate and I accept the Government's figures as to acreage as shown on "Exhibit 5".

The value of the lands granted to the City by the Government was $244,139.45; that embraces all of the acreage shown on "Defendant's Exhibit A", and accords with the legend as set forth on the Exhibit.

I am familiar with the lands shown in yellow on "Defendant's Exhibit A". These are the lands which were acquired by the City and given back to the United States Government.

[203]

Q. Do you know the total acreage and the value?

(Testimony of Joseph James Phillips.)

Mr. Hennessy: I object to that upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The same ruling. I will allow it subject to a motion to strike.

The Witness: This total acreage was 1698.36 acres and its value $74,409.00; that includes all of the acreage acquired by the City and conveyed to the United States Government. The value of the roads and trails constructed by the City is included in my figure of $244,000.00 respecting the value of property granted by the City to the Government.

The Government did not own any of the lands upon which the Moccasin Power Plant is constructed with the possible exception of half an acre up on the hillside that we took as a sort of protective area. The balance was practically all privately owned.

Q. As purchasing agent for the project, and acquiring property for it, did you acquire any water rights from the United States Government?

Mr. Hennessy: I object to the question on the ground it is immaterial, irrelevant, and incompetent. We are not concerned with water rights in this case, your Honor. We are simply concerned with power and the disposition of the power.

The Court: I will allow it subject to the objection and a motion to strike.

(Testimony of Joseph James Phillips.)

The Witness: No.

Witness (continuing): I am familiar with the so-called Ham Hall purchase made by the City and County of San Francisco which involved $1,052,000, and included water rights, lands and development work, buildings and various other items at Cherry and Lake Eleanor.

There are three watersheds involved in the Hetch Hetchy project, one is Hetch Hetchy Valley, the other two are in the watersheds of Lake Eleanor and of Cherry River. Ham Hall purchased the land, buildings and did the development work, surveying and other work in these watersheds of Lake Eleanor and Cherry River.

The water rights of Hetch Hetchy project were acquired both by purchase and appropriation. I have not the value of these rights. The value of the lands obtained from the Government for the project was $244,139.45.

Mr. Holm: Have you the figures of what it cost the City and County of San Francisco to purchase the area that is indicated in red at the Moccasin Power plant on [204] Defendant's Exhibit A?

Mr. Hennessy: I object to that question as immaterial, irrelevant, and incompetent, and not within the issues of this case.

(Testimony of Joseph James Phillips.)

The Court: The objection will be overruled. All of this line of testimony is going in subject to a motion to strike.

The Witness: A. I have not the itemized figures here of the various properties. What I have is my valuation of real property owned by the City and County of San Francisco which under the charter it is my duty to prepare every year, and which shows all properties owned by the City. In this book is everything in connection with the Hetch Hetchy project.

Q. Would you kindly relate what the properties are that are used in connection with the Hetch Hetchy project, and their value?

Mr. Hennessy: I object to that question upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The objection is overruled.

Mr. Hennessy: Note an exception.

The Witness: A. I have before me a report showing—do you want the property as well as the price?

Q. Yes, I certainly do.

A. Tuolumne County there is a reservoir land, rights of way, reservoir land, aqueduct, power plant, regulating reservoir, rights of way, electric transmission lines and rights of way, Hetch Hetchy railroad land and rights of way. In further toward the city I have railroad land, aqueduct and electric transmission line,

(Testimony of Joseph James Phillips.)

with a total of $2,372,514. Those are the actual figures taken from the deeds.

Q. That likewise is the amount of money that the City and County of San Francisco paid for aqueduct, tunnels, rights of way, parcels of land that were required to be acquired in fee, and, in short, the entire value of the real property involved or the easements in the Hetch Hetchy project?

A. Yes.

Cross Examination

The patented lands acquired by the City and County of San Francisco were acquired both before and after July 1, 1925, but, practically, all of them prior to 1925. The value which I have given to these patented lands is their cost price. In stating the value of the land given by the Government to the City [205] I had in mind the date of acquisition and the date of the signing of the contract of July 1, 1925, as there was practically no difference in the value during that period, either date would fit. The lands and easements given by the Government to the City and County of San Francisco under the Raker Act had been acquired by the City prior to July 1, 1925. It was necessary that San Francisco acquire these lands and easements in order to complete the Hetch Hetchy project.

R. B. HANSEN

recalled as a witness for the defendant, further testified as follows:

I have prepared from our office records a memorandum showing the cost to the City and County of San Francisco in carrying out its obligation under the Raker Act with respect to the construction of roads and trails to be given to the Government, the cost of the lands which were to be conveyed to the Government and the amounts that were annually to be paid to the Government under the terms of the Raker Act by way of rentals and expense by the Government. (Admitted over plaintiff's objection and subject to motion to strike.)

As shown by our office records the actual cost to the City of the trails mentioned in Section 9(p) of the Raker Act on the north side of the Hetch Hetchy Valley, reservoir site and extending from said trail to the Tiltill Valley and to Lake Vernon, and the road or trail to Lake Elcanor and Cherry Valley and to McGill Meadow was $82,670.04. (Admitted over plaintiff's objection and subject to motion to strike.)

Q. In addition to that, in lieu of the building of the trails on the north side of the valley, and constructing the road from Hetch Hetchy to all those valleys were certain amounts paid to the United States Government and accepted by the Secretary of the Interior in or about the year 1930?

(Testimony of R. B. Hansen.)

A. They were.

Mr. Hennessy: I object to the question as immaterial, irrelevant, and incompetent and subsequent to the entering into of this contract between the Pacific Gas & Electric Company and the City and County of San Francisco.

Mr. Searls: That is all the more reason it should be introduced, because if the Secretary of the Interior, after the city entered into this contract, continued to accept on behalf of the Government the benefits under the grant it ought to bear more upon a court of equity.

Mr. Hennessy: We are not asking for a forfeiture of the grant. We are simply asking for a compliance with the Raker Act.

Mr. Searls: But you are asking for an injunction which would be tantamount to a forfeiture as it prevents [206] the city from distributing its power.

Mr. Hennessy: The city could distribute power to municipalities, municipal water districts and irrigation districts under this Act.

Mr. Searls: We will show pretty soon the impossibility of doing that.

The Court: The objection will be overruled. I will allow it.

The Witness: A. There were five payments made by the City and County of San Francisco to the United States Government, a payment of $250,000 in each of the five years, 1932 to 1936, inclusive. This gives a total of $1,250,000.

(Testimony of R. B. Hansen.)

Counsel for the defendant offered in evidence a letter dated December 8, 1930, from Ray Lyman Wilbur, Secretary of the Interior to John J. O'Toole, City Attorney of San Francisco, with respect to the payments to the Government concerning which the witness had testified. Said letter was received in evidence, and marked

"DEFENDANT'S EXHIBIT B".

It reads as follows:

"The Secretary of the Interior,

Washington Dec. 8, 1930

John J. O'Toole, Esq.,
City Attorney,
San Francisco, California.

My dear Mr. O'Toole:

I have received with a letter of transmittal dated December 8, 1930, signed by Senators Hiram W. Johnson and Samuel M. Shortridge and Representatives Richard J. Welch and Harry L. Englebright, argument presented by the Committee representing the City and County of San Francisco at conference in this Department on December 4, 1930, in regard to the existing arrangements for the distribution of power from the Hetch Hetchy project in Yosemite National Park, together with tentative agreement reached in conferences of said Committee with the Director of the National Park Service on December 5 and

(Testimony of R. B. Hansen.)

6, 1930, relative to the City's obligations as to the construction of roads and trails in the park under the Raker Act, said agreement being subject to final approval by the Board of Supervisors of San Francisco.

I have carefully considered the proposal of the City relative to a fulfillment of its road and trail construction obligations under the Raker Act and have to advise that the program submitted, if approved by the [207] Board of Supervisors, will fully satisfy the demands of this Department as to such construction as provided for under said Act.

I note that your communication advises the Department of the City's three-year program for compliance with the provisions of the Raker Act respecting power distribution, which will be followed with interest. Kindly keep me advised of the completion of the successive steps outlined.

Sincerely yours,
(s) RAY LYMAN WILBUR,
Secretary."

[Witness continuing]: The program to which I have testified cost $1,250,000.00, was the program which was subsequently approved by the Board of Supervisors and followed out. In addition to this expenditure the City paid the

(Testimony of R. B. Hansen.)

entire cost of grading and constructing the present highway, nineteen miles, leading from Mather into the Hetch Hetchy Valley. Its cost was $353,500.91. That road has been conveyed to the United States Government and is being used by the public. (Admitted over plaintiff's objection and subject to motion to strike.)

The City also constructed a wagon road from Hetch Hetchy reservoir to Lake Eleanor at a cost of about $75,000.00. That road is available for public use under safety restrictions. In addition, the City reimbursed the Tuolumne Water Supply Company to the extent of $85,000.00, for sums expended by that Company between 1902 and 1911 in constructing roads and trails in the Stanislaus National Forest which the City later made available to the Government and the public. The total expenditures made by the City in the construction of roads and trails in the National Park or for which money was furnished by the City, either to the Government or to its predecessor, in interest, when the trails were later turned over to the Government, was $1,846,170.95. In compliance with Section 9(t) of the Raker Act, the City returned to the Government 1698.36 acres which it had previously bought from private persons and which were not necessary for use under the provisions of the Raker Act. These lands have been appraised at $100.00 an acre which

(Testimony of R. B. Hansen.)

would give their total appraised value $169,836.00. (Admitted over plaintiff's objection and subject to motion to strike.)

The City has regularly paid to the Government the annual payments required to be made to it by Section 7 of the Raker Act. All of these sums have been remitted to the Secretary of the Interior and retained. The total amount so paid, including payments for the year 1937, was $330,000.00. (Admitted over plaintiff's objection and subject to motion to strike.)

Q. I ask you whether you have capitalized what the payments of this semi-annually to the Government will mean to the City and County of San Francisco?

Counsel for the plaintiff objected to the question upon the ground that it was irrelevant, incompetent and immaterial, and had no bearing [208] upon the issues of the case.

The Court sustained the objection.

Counsel for the defendant duly excepted to said ruling. Said ruling and exception are herein designated as Ruling and Exception No. 8.

I have apportioned the proper overhead expense of engineering, and administration with respect to the item of maintenance and trails and roads and have estimated it at ten per cent of the total. If the amount thereof be

(Testimony of R. B. Hansen.)

added to the cost of the roads and trails as previously given, the grand total would be $2,702,607.00. (Admitted over plaintiff's objection and subject to motion to strike.)

Mr. Searls: I desire to offer in evidence a letter from Secretary of the Interior Hubert Work, dated May 18, 1928, addressed to the City and County of San Francisco, care of the City Attorney, and dealing with the requirements of the Government with respect to road construction and the program which was to be followed by the city.

Mr. Hennessy: We object to it upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case. The Court is not concerned with the matter of compliance with other provisions of the Raker Act in question. There is the further objection that the Government is not bound by any statement made by Secretary Work or any other administrative officer of the Government in connection with this matter.

The Court: What is the purpose of the offer?

Mr. Searls: The purpose of the offer is to show that the Secretary of the Interior commencing after the date of this contract repeatedly called upon the city to perform its obligation under the grant and, as this letter will show, suggested the use of the power revenue

(Testimony of R. B. Hansen.)

which was derived under this particular contract with which to finance part of this obligation. We think it is a very important consideration for the Court, on argument, and we would like to have these facts in the record for the purpose of so doing.

The Court: I will let you make your record. I will allow it.

Said letter was thereupon received in evidence and marked

"DEFENDANT'S EXHIBIT C".

It reads as follows:

"The Secretary of the Interior
Washington

May 18, 1928

The City and County of San Francisco,
Care of the City Attorney,
San Francisco, California. [209]

Gentlemen:

In response to a formal request for compliance with certain obligations imposed by the act of December 19, 1913 (38 Stat. 242), commonly known as the Raker Act, made by letter of July 7, 1927, the City Attorney for the City of San Francisco, on October 13, 1927, addressed to this Department a statement of the contentions of the City with respect to those obligations.

(Testimony of R. B. Hansen.)

Full and careful consideration of these contentions was had by the Solicitor for this Department, whose views are set forth in an opinion, a copy of which is inclosed. These views have been approved by the Department.

The conclusion has been reached that the roads and trails required to be built and maintained by the City are such as would have been required had performance of these conditions been tendered by the City in 1913. This raises the question whether the requiremnts stated in the letter of July 7, 1927, were of roads and trails in excess of those standards.

As stated in the Solicitor's opinion the test is not only as to the kind of roads and trails which were necessary to make Yosemite National Park easily accessible to the public visiting said park in 1913, but includes the kind and quality of roads which would have been required to meet what would then have been regarded as a reasonable future need of the public in the park.

The contention of the City that the main roads leading into the Yosemite National Park and the main roads with which the roads required to be built would connect, are to determine the standard of construction required, can not be accepted as correct.

Data available indicate that in 1913, the United States owned only 46 miles of road in

(Testimony of R. B. Hansen.)

Yosemite National Park, all of which were in the Yosemite Valley or in the Mariposa Big Tree Grove. There were also within the park approximately 106 miles of wagon road typical mountain roads which in many instances had so fallen into disrepair as to be impassable. The Tioga Road, referred to in the letter of the City Attorney, was in that condition and the Big Oak Flat Road, also mentioned, was used to some extent by park visitors, but was not in a satisfactory condition. There was also a road from Groveland via Smith Station or Hamilton to Hog Ranch, which was a typical mountain road. One of the requirements of the Raker act was that a road be built by the City over this latter route, which requirement necessarily meant that roads of that standard were not regarded as adequate.

During September, October and November, 1912, the road on the floor of the Yosemite Valley from Pohono Bridge to Yosemite Village was graded and macadamized near Camp Ahwahnee. This road was macadamized to a width of 22 feet and from May to July, 1913, further work was done in that [210] vicinity, the road being macadamized to a width of 16 feet. In May, 1913, work was started toward widening the El Portal Road between El Portal and Yosemite Valley from 10 feet to 25 feet, with a driveway 18 feet in width.

(Testimony of R. B. Hansen.)

Certain of the foregoing work was of an experimental nature and consisted of covering a water-bound macadam road with a two-inch bituminous coat. Two grades of bituminous material were tried, i. e., a road oil and also pure asphaltum, the top-wearing coat being 12 feet in width.

The fact that most of the roads within the Yosemite National Park were privately owned prevented much progress until said roads could be acquired by the United States, and limited appropriations for road building also deterred rapid development of roads, the need for which was recognized prior to 1913.

All the roads in and about the park in 1913 had been built long prior to that time, and solely for horse-drawn vehicular travel. It was recognized that those roads were unsafe for automobile travel, and it was not until August, 1913, that automobiles were permitted to enter Yosemite National Park. This was permitted as the result of repeated requests by automobile associations. The State of California built its first automobile road in 1912, and by 1913 definite progress on such roads was being made.

All these facts were known when the Raker act was passed and in leaving to the Secretary of the Interior the right to specify the kind of roads to be built, the Congress and the City

(Testimony of R. B. Hansen.)

plainly intended that he should specify roads of a kind which would care for not only present but future travel within the park. It is not believed that the City intends to assert that, by the provisions in the Raker act for roads to be built by it to important points within the park, said roads to be perpetually maintained, travel by a then established and rapidly growing mode was to be excluded from those areas. The purpose of the City, as stated in its brief in support of the Raker act, was to make the park readily accessible to all the people, and the City of course, now intends to do no less than that.

The notice of July 7, 1927, contemplated roads made of crushed rock with a water-bound macadam surface of 18 feet travelable width. The maximum grade was to be 8 per cent. In the case of the road formerly the bed of the railroad built by the City, it was intended that this road be surfaced with asphalt penetration macadam. Should Cherry Valley be opened in the future by a road, then a road from Lake Eleanor to Cherry Valley of the above standards will be required.

The foregoing standards are not in excess of those which in 1912 and 1913 were being considered by the United States for Yosemite National Park. [211]

These requirements are not met by the two roads built by the City for its own use, and

(Testimony of R. B. Hansen.)

its contention that said roads have heretofore been approved as satisfactory in that respect, is not supported by the records.

No issue is raised as to trails required to be built.

The Department, in view of the foregoing repeats its request of July 7, 1927, that roads and trails of the kind specified be constructed without delay.

Meeting the request of the City for an extended program for road building, it is concluded that the order in which this work should be carried out is as follows:

1. Construct a trail along the north side of the Hetch Hetchy reservoir and to Tiltill Valley and Lake Vernon. This work will probably require from 9 to 12 months for completion.

2. Construct the Harden Lake road which reasonably might require one year's time.

3. Construct the Hetch Hetchy-Lake Eleanor road. This work may possibly require 18 months.

4. Reconstruct and surface the road from Hog Ranch to the Hetch Hetchy dam, which will probably require 6 months' time.

The foregoing program covers a period of four years, which is the time estimated by the City as necessary to complete the project so as to place the stored waters in actual use for

(Testimony of R. B. Hansen.)

domestic purposes. The City, however, is annually deriving from power development, revenues estimated at an excess of two million dollars, which revenue for any one year will more than pay the cost of the roads required by the Department.

In view of the foregoing it is concluded that the request for roads and trails heretofore made is a reasonable and proper one which should be met within the time specified.

In the matter of conveying lands to the United States, the contention of the City that it is not required to convey lands acquired by it after the passage of the Raker act is recognized as correct.

The right of the City to retain for sanitation control or any other purpose, lands not actually required for the works of its project, whether adjoining the reservoirs or elsewhere, can not be recognized since the Raker act and the circumstances under which it was adopted clearly show that all lands then owned and not so required were to be conveyed to the United States as partial consideration for the grant made to the City. [212]

If the City now contemplates the increasing of the heights of the dams at Hetch Hetchy or Lake Eleanor, it should so state, giving information as to the probable time when such work will be done and the need for the same. If such

(Testimony of R. B. Hansen.)

enlargement is approved, the flow lines of the enlarged reservoirs can be readily ascertained and the quantum of upland to be conveyed to the United States can then be determined.

With the exceptions above stated as to after-acquired lands, the request for conveyances of lands, made on July 7, 1927, is hereby repeated.

The City is requested to arrange at once for compliance with the foregoing requests, which are in conformance with an opinion of the Attorney General of the United States, whose duty to enforce the provisions of the Raker Act is created by said statute, rendered under date of May 16, 1928, copy of which is herewith inclosed.

Very truly yours,
(Sgd.) HUBERT WORK,
Secretary."

By stipulation, counsel for the defendant were permitted to withdraw the original letter, which is part of the office records of the City Attorney's office, and to substitute a copy of said letter therefor.

JOHN J. DAILEY,

a witness for the defendant, being first duly sworn, testified as follows:

I am a Deputy Attorney General of the State of California. From 1917 to 1928, or 1929, somewhere along there, I was Assistant City Attorney of the City and County of San Francisco. In my capacity as Assistant City Attorney during the year 1925, I had to do with the preparation of the contract between the City and County of San Francisco and Pacific Gas and Electric Company relative to the distribution of the power generated at the Moccasin Creek Plant of the Hetch Hetchy project. I am familiar with said contract. I practically drew it with the assistance of Mr. Searls.

I recognize "U. S. Exhibit No. 6" now shown me, as the contract which Mr. Searls and I prepared. At or about the time that the contract was prepared I had conferences or conversations with the Secretary of the Interior or an Assistant Secretary regarding the provisions of the contract. These conversations were held at Wash- [213] ington, D. C., in the Department of the Interior. The first conferences were had some time in June, 1925, and extended over a period of two or three weeks. I had gone from San Francisco to Washington for the purpose of discussing the contract. As stated, the first conversations were in June, 1925, and extended up to the earlier days of July, I think the first

(Testimony of John J. Dailey.)

or second of July. I, possibly, had some conversation with him then. I did not leave Washington until after the 4th of July.

My conversations were with Mr. Edwards, who was the Assistant Secretary of the Interior. I had a number of conferences with him.

Accompanying me on my trip to Washington and representing the City of San Francisco with me were Mr. Searls, who is present here in Court, and Mr. Nelson Eckhart, one of the engineers of the City.

At the conversation which we had with Mr. Edwards during the month of June, 1925, there were present with Mr. Edwards, Mr. Eckhart, Mr. Searls and myself. The three of us had several conversations with Mr. Edwards before we had further conversations with other people in the department. These conversations were held in the office of the Department of the Interior building. Mr. Edwards was the Assistant Secretary of the Interior. At one time he was Solicitor of the Department. I am not positive whether at the time of our conversation with him, Mr. Edwards was solicitor of the Department or the Assistant Secretary. I am under the impression that he was at that time the Assistant Secretary and had formerly been Solicitor. I may be mistaken about that, but he was acting on behalf of the Secretary in this matter because it had been referred to him. At the time he was either the Assistant Secretary

(Testimony of John J. Dailey.)

of the Department or Solicitor for the Department.

Q. Now, will you state the substance of the conversation?

The plaintiff objected to the question upon the grounds that it was hearsay, not with a party to the cause or with anybody authorized to bind any party to the cause, that the proper foundation had not been laid in that the identification of the party with whom the conversation was had, had not yet been established, nor the time of the conversation established with any particular definiteness. The Court sustained the objection to the question, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are herein designated as Ruling and Exception No. 9.

(The witness continuing): [214]

At a subsequent time, I had a conference with Dr. Hubert Work, Secretary of the Interior, relative to the contract. That conversation took place in Dr. Work's office in the Department of Interior Building. There were present at it with me, Mayor Rolph of San Francisco and Ralph McLaren, then Chairman of the Board of Supervisors of the City and County of San Francisco. That conversation occurred late in July or early in August of 1925. It was on a second trip I had made to Washington on the same matter. There were present at this later conference, Dr.

(Testimony of John J. Dailey.)

Work, Secretary of the Interior, Mr. Edwards, Mayor Rolph, Supervisor McLaren and myself. There may have been some other Secretary or clerk there, but I am not sure. The subject of the conversation was the contract of July 1, 1925, which we had placed before the Department of the Interior.

Q. State the substance of the conversation between those present at that conference.

To this question counsel for the plaintiff objected upon the ground, first, that it was hearsay, and, second, that it is not binding upon and could not have bound the United States. [215]

After the argument the pending question was read to the witness as follows:

(Q. State the substance of the conversation between those present at that conference? (Referring to the conference at which are present Mayor Rolph of San Francisco, Ralph McLeran, Chairman of the Board of Supervisors of San Francisco, and the witness, representing the City, and Dr. Hubert Work, Secretary of the Interior of the United States).)

Thereupon counsel for the Government restated his objection to said question as follows:

We object to the question upon the ground that it is hearsay, there being no evidence it was the statement of any party to this contro-

(Testimony of John J. Dailey.)

versy and it does not appear that the party who made the statement was in any way empowered to bind the Government and on the further ground that what is sought to be elicited is irrelevant, incompetent and immaterial, and has no bearing or issue upon the case.

The Court overruled the objection and stated that it would allow the testimony to go in subject to a motion to strike it out.

The Witness: In this conversation in the office of Dr. Work, the Secretary of the Interior, which occurred some time in August, 1925, possibly the same day that he wrote a letter which he handed to Mayor Rolph, or myself, on behalf of the City, and somewhere after the first of August, 1925, (which was subsequent to the delivery of the contract of July 1, 1925), the Secretary of the Interior at the very close of our conversation with him, relating to this contract, told us that it was not his duty to approve contracts submitted to him; that he would only be called upon to perform the duty if he believed that the City and County was violating the terms of the Raker Act; that he was not prepared to say that the City was violating it; that, as far as he was concerned, he would let the matter run on to be determined at some later date, after he saw what the operations of the contract would re-

(Testimony of John J. Dailey.)

sult in; that was the substance of the conversation. (It was stipulated by the counsel that this conversation was subsequent to the execution of the contract of July 1, 1925, and subsequent to the commencement of operations by the parties under that contract.) [216]

Thereupon counsel for the plaintiff moved to strike out the answer of the witness relative to the conversation as not being within the terms of the purpose for which it was offered, and not within the offer. In that connection counsel for the plaintiff stated that the conversation had been offered as a contemporaneous construction of the contract, and that forfeiture had nothing to do with that statement. In response to said motion, the Court stated as follows:

"I will allow it subject to the motion."

Thereupon the following occurred:

Mr. O'Toole: Q. Mr. Dailey, I believe you stated this morning that you were one of those who aided in the preparation of the contract between the City and County of San Francisco and the Pacific Gas & Electric Company relative to the disposition of Hetch Hetchy power.

A. Yes.

Q. At the time you were engaged and before you started preparation of that contract did you have any ruling or opinion from the Secretary of the Interior or from any of his solici-

(Testimony of John J. Dailey.)

tors, as to whether or not an agency contract might fulfill the obligations of the Raker Act?

A. We had.

Mr. Licking: If your Honor please, I do not see the materiality or relevancy of this. The question before this Court, as I understand it, is whether this is an agency contract or whether it is not an agency contract. I think that is the Government's position clearly enough. Any correspondence which they may have as to whether an agency contract would do or would not do hasn't much to do with this case. If it is an agency contract and the P. G. & E. as the agent is serving the City and County of San Francisco instead of buying it might be that the Raker Act is not being violated, so it would seem to me that the previous conversation relative to an agency contract is not material to any issue in this case. I object to them on the first ground that they are clearly hearsay, not binding on the Government in this case, and, second, that they are not relevant to any issue in the case.

The Court: The objection will be sustained.

Thereupon, the following occurred:

Mr. Searls: I would like to ask counsel for the Government if he will stipulate that if this contract was a contract of agency it would not violate the terms of the Raker Act.

(Testimony of John J. Dailey.)

Mr. Licking: No, I could not stipulate to that, [217] because of the facts in the situation that we are concerned with in addition to the contract.

Thereafter, as the result of further discussion between counsel, the objection to said opinion (being an opinion dated June 8, 1923, by John H. Edwards of the U. S. Department of the Interior relative to the disposal of power by the City and County of San Francisco) was withdrawn, and said opinion was admitted in evidence, marked

"DEFENDANT'S EXHIBIT D".

It reads as follows:

"Department of the Interior
Office of the Solicitor
Washington

M. 10228 June 8, 1923.

The Honorable
The Secretary of the Interior.

Dear Mr. Secretary:

At the request of the National Park Service there has been referred to me for opinion the question whether the City and County of San Francisco may sell to a private corporation for the purpose of resale and distribution to consumers the electric energy developed under its grant contained in the act of Congress approved December 19, 1913 (38 Sta., 242).

(Testimony of John J. Dailey.)

Section 1 of that act granted to the said municipal corporation rights of way over public lands in certain specified counties and in the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating, and maintaining aqueducts, canals, ditches, pipes, and other conduits for conveying water for domestic purposes and uses; also for the purpose of constructing, operating and maintaining power and electric plants, poles, and lines for generation and sale and distribution of electric energy; also for telegraph and telephone lines, roads, railroads, and other means of locomotion, transportation, and communication, such as may be necessary or proper in the construction, maintenance, and operation of the works constructed by the grantee; also the right to use such lands in the Hetch Hetchy Valley and other specified places as the Secretary of the Interior may determine to be necessary for reservoirs, diverting and storage dams, power houses, and other construction necessary in connection with said project.

Section 6 of the said act provides:

'That the grantee is prohibited from ever [218] selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric

(Testimony of John J. Dailey.)

energy sold or given to it or him by the said grantee; Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.'

Section 9 of the act contains the following several provisions:

'That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

* * * * * * *

That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to said Department of the Interior, then such expense shall be borne by said grantee.

* * * * * * *

That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is

(Testimony of John J. Dailey.)

made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.'

Section 11 reads as follows:

'That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.'

[219]

It is shown by certain correspondence submitted to me that the grantee has been since 1918 selling its surplus hydroelectric energy to the Sierra and San Francisco Power Company and to the Pacific Gas and Electric Company. It is stated that in the first instance this was done by order of the Federal power administrator during the war. The total sum received from the sale of this power is something more than $200,000. It also appears that the city engineer

(Testimony of John J. Dailey.)

has recommended to the board of supervisors more extensive sale of power to private corporations for distribution to save the necessity of purchase or construction of a distribution system by the grantee for the time being.

The sales made under the war emergency order may be eliminated from consideration. The inquiry will be directed to the more important point contended for by the grantee as represented by the city attorney, namely, that the grantee is strictly within its rights under the terms of the grant in selling such power in the manner stated for the purpose of resale; that if any restriction of this nature is contained in Section 6 of the act, it applies to the purchaser and not to the grantee; that in any event the act does not provide any forfeiture for such violation or any means by which the restriction can be enforced.

I have been unable to find in the language of the act support for this view of the law. I understand its provisions to be exactly and plainly opposed to such construction. The prohibition against such sale for the purpose of resale is contained in section 6 of the act above given. The act clearly contemplates public development and ownership, sale and distribution to consumers of the water and hydroelectric energy, and not merely the development of water and power for sale to private concerns

(Testimony of John J. Dailey.)

for resale and distribution. The legislative history of this law amply supports this interpretation of the language employed in the act.

The House Committee of Public Lands, in its report on the bill (Report No. 41, 63d Congress, first section), said in respect to section 6 of the act:

> 'Section 6 provides that the grantee is prohibited from selling or letting to any corporation or individual, except a municipality, a water district, or an irrigation district, the right to sell or sublet the water or electric energy sold or given to it by the grantee; it is provided also that the rights under the grant shall not be subject to sale, assignment, or transfer to any private persons, corporation, or association. (This provision acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.)' [220]

That report contained a brief by the grantee urging enactment of the bill wherein the condition here in question was characterized as follows: "The City is prohibited from ever selling to private corporations or individuals the right to sell water, thus protecting this grant from ever falling into the hands of speculators."

This section was the subject of extended discussion when the bill was pending in the House

(Testimony of John J. Dailey.)

of Representatives, wherein Mr. Raker, Mr. Ferris, and other members of the Committee on Public Lands took part. It was stated that San Francisco did not own its lighting system, and Mr. Raker said that it was the purpose of the bill to have the city supply electric power and water to its own people. He was asked pointedly whether the plan was to furnish this direct to the people or to supply the corporation which would in turn supply the people. He answered in part as follows:

"Under this bill it is to supply its own inhabitants first. It is to supply the public utilities, the courthouse, the schoolhouses, the street lights, and such things as that for its own citizens. Next, it is to supply those around the bay—some 10 cities that may come under the State law and become beneficiaries of this system and pay their proportion.

The cities around San Francisco Bay join in asking that San Francisco be given the Hetch Hetchy grant. These cities propose—and the State law permits—to organize a metropolitan water district, and the Hetch Hetchy system, together with the local water, will insure an adequate supply for the future." (Page 4624, 63d Congress, first session.

In the course of discussion, it was suggested that some of the minor municipalities might

(Testimony of John J. Dailey.)

abuse their privileges by taking more power or water than needed for their use and selling same to private corporations for resale, and it was suggested that this resale should be guarded against. Speaking to this point, Mr. Thomson, a member of the Committee, said at page 4417:

'Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individuals or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? That is provided here now.

* * * * * * * *

Let me suggest that if this language is read carefully I think it will be seen that it covers the gentleman's contention. These municipalities are prohibited from ever sell-

[221] ing or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it.'

He further said that the municipalities could sell only to consumers.

There is found much discussion along the same line at various places in the record. At page 4509 Mr. Ferris, chairman of the committee in charge of the legislation, said that

(Testimony of John J. Dailey.)

the City is to be given the right to sell to its own people who are consumers but that "they can sell for use only with a positive restriction against sale for any resale purposes of any sort." At page 4512 of said record Mr. Thomson, a member of the committee, gave voice to the following clean cut and emphatic expression:

'Mr. Chairman, there seems to be some misgivings in the minds of some of the gentlemen here about the amount of compensation, and that seems to have arisen, in some measure, at least, because of doubt on the part of some as to the power possibilities in this bill. When this bill was being considered by the committee, I offered an amendment to section 6, line 16, as it appears in the bill, by adding the words 'or electric energy.' With those words in that section, the bill amounts to this, that San Francisco can take this water, and San Francisco may develop such power as it may develop from the drop of that water from the Hetch Hetchy to the level of the city reservoirs, and San Francisco may sell this water or electric energy to whom? To any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city

(Testimony of John J. Dailey.)

for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it.'

I am of the opinion that the language of section 6 comports with the purpose of the law as declared by the several members of the committee in charge of the bill. The debates in the Senate were devoted mainly to other provisions of the bill and this particular feature was given only incidental attention. It is observed, however, that Mr. Poindexter, an opponent of the measure, used the following language, page 301, second session, 63d Congress:

'There is a specious provision in the bill that the city of San Francisco shall not grant to any private person the right to sublet or to sell the power or the water which it may acquire the right to develop or to use under this bill; but that is left entirely to the good faith of the city. [222]

There is no forfeiture clause; there is no practical way in which the Federal Government could ever enforce that provision.'

At another place in the debate reference was made to the fact that the first provision in sec-

(Testimony of John J. Dailey.)

tion 6 is similar to that contained in the grant to the city of Los Angeles by the act of June 30, 1906 (34 Stat., 801). In reply to that suggestion, Senator Works stated that in that case the provision was not objectionable to Los Angeles; that the provision amounted to nothing, as the State law imposed the same restriction, and this was merely a statement of the law of California.

But the city attorney takes a different view of the law of the State of California, as he says the laws of that State permit the city to sell power to any person it pleases, and that if section 6 be read in connection with section 11 of the act there would be no restriction on the right of the city to sell its power.

Section 11 of the act above quoted was drawn from section 8 of the Federal reclamation act of June 17, 1902 (32 Stat., 388), and contains substantially the same provisions, which fact was mentioned repeatedly in the debates of the Hetch Hetchy bill. Clearly it was designed to disavow any intention to interfere with water rights acquired under the State laws.

There was shown in the debates on this bill much difference of opinion as to the power of Congress to impose the various restrictions contained in the act, and the House Committee in its elaborate report cited numerous court decisions and legislative precedents in support

(Testimony of John J. Dailey.)

of the provisions of the bill. I deem it inappropriate to enter that field of discussion, my function being to advise merely as to what the law provides and the manner of its enforcement. I have indicated above that in my opinion the law prohibits the sale of electric energy by the grantee for the purpose of resale. The method of enforcing the act is plainly stated in the proviso to section 9. I may add, however, that I would not recommend resort to that extremity at this time, but would make known to the grantee the views of this Department in the matter with a suggestion that arrangement be made for the use or distribution of the surplus electric energy by a method which would not conflict with the law. It seems reasonable to suppose that the grantee may find obstacles in its way which would make it impracticable to acquire or construct a system for the transmission of its limited supply of electric power, and to avoid waste of this surplus energy it is quite desirable that the existing means of transmission be availed of until such time as the supply becomes sufficient to justify the taking over of the present system or the construction of a new one. But instead of selling this power for resale and distribution, as has been done and as further proposed, it occurs to me that it would be feasible for the

(Testimony of John J. Dailey.)

parties to agree upon terms by which the grantee would have its power trans- [223] mitted over the lines of the concern owning or controlling the existing distribution system. This method would avoid conflict with the provisions of the law and apparently would accommodate the grantee to the existing conditions of the project. Should the grantee decline to consider this or any other method for use of the electric power in conformity with the grant, as here interpreted, then I would suggest submission of the matter to the Attorney General as provided by section 9 of the act.

Respectfully

(Signed) JOHN H. EDWARDS,

Solicitor.

June 8, 1923.

Approved:

(Signed) E. C. FINNEY

First Assistant Secretary."

Thereupon, the following occurred:

Mr. O'Toole: Q. Mr. Dailey, in the preparation of the contract between the City and County of San Francisco and the Pacific Gas & Electric Company as to the distribution of the Hetch Hetchy power, did you rely upon

(Testimony of John J. Dailey.)

the rulings of the Solicitor of the Department of the Interior relative to the validity of an agency contract?

Mr. Licking: To which I object on the ground it is immaterial what Mr. Dailey relied on or what anyone relied on. That has not any bearing on the question now before the Court, as to what this contract actually is.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 10.

Cross-Examination.

The conversation with Secretary Work to which I referred in my direct examination occurred shortly before he handed us a letter, because when we went to his office the letter had already been written to us and he gave it to us at that conversation. The letter, dated August 9, 1925, from Hubert Work, Secretary of the Interior, to Hon. James Rolph, Jr., Mayor of San Francisco, a certified copy of which you now show me is the letter which was handed to Mayor Rolph at that conversation.

[224]

Counsel for the plaintiff thereupon offered said certified copy of said letter in evidence. It was received in evidence and marked

(Testimony of John J. Dailey.)

"U. S. EXHIBIT No. 15";

it reads as follows:

"The Secretary of the Interior
Washington,

August 19, 1925.

Hon. James Rolph, Jr.,
Mayor of San Francisco,
New Willard Hotel,
Washington, D. C.

My dear Mr. Mayor:

The act approved December 19, 1913 (38 Stat. 242), does not require the Secretary of the Interior to approve or disapprove contracts such as the contract entered into between the City and County of San Francisco and the Pacific Gas & Electric Company dated July 1, 1925.

It is the duty of the City and County of San Francisco at all times to comply with and observe on its part all the conditions specified in this act; and it is the duty of the Secretary of the Interior, in the event that the conditions specified in the act are not reasonably complied with and carried out, to report the facts, after notifying the City and County of San Francisco in writing, to the Attorney General for such suits or proceedings in the proper courts as the law and the facts in his opinion warrant. The Secretary should not act at this time, but must await such development of facts as

(Testimony of John J. Dailey.)

will enable the Secretary to determine with a certainty whether or not this act is being reasonably carried out by the City and County of San Francisco.

The violation of the law, if any, is a fact evidenced by acts, and the Secretary must necessarily await a reasonable time until performance shall have indicated whether or not the acts of the parties constitute such a violation of the law as will make action on his part proper.

Very respectfully,
(Signed) HUBERT WORK,
Secretary."

Redirect Examination.

Counsel for the defendant offered a letter dated July 20, 1925, signed by C. Edward Wright, Acting Solicitor of the Department of the Interior, and addressed to the Honorable Secretary of the Interior, to which was attached a copy of the agreement of July 1, 1925, between the [225] City and County of San Francisco, and Pacific Gas and Electric Company ("U. S. Exhibit 6"). Counsel for the plaintiff objected to the offer on the ground that said letter was incompetent as proof of any issue in the case, and irrelevant to any issue of the case. It was merely a communication to the Secretary expressing some personal views of the Solicitor,

(Testimony of John J. Dailey.)

and was not a communication which was ever proposed to or acted upon by the defendant, and therefore there could not have been any reliance upon it. In response to said objection counsel for the defendant made the following statement:

> Mr. O'Toole: It is offered, if your Honor please, for two reasons, the Secretary or the Assistant Solicitor was undoubtedly, at the request of the Secretary called upon to offer a legal construction of the contract between the City and the company, and therefore it was a contemporaneous construction of that particular document. Furthermore, it is a foundation and shows the reason for the letter of the Secretary, himself, addressed to Mayor Rolph under date, I think, of the 19th of August, which is now here in evidence as an exhibit ("U. S. No. 15") of the United States in this case.

Thereupon, the following occurred:

> Mr. Licking: If it is offered as a reason for showing somebody else did something I object to it on the ground that as to showing the reason for somebody else doing something it is quite obviously merely conjecture, and could have no relevancy and no bearing on any issue here.
>
> The Court: Is the matter submitted?
>
> Mr. O'Toole: Yes.
>
> The Court: The objection will be sustained.

(Testimony of John J. Dailey.)

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 11.

The document which was the subject of said ruling was thereupon marked as

"DEFENDANT'S EXHIBIT E"

for identification; it reads as follows:

"Department of the Interior
Washington.

Address only
Secretary of the Interior

July 20, 1925 [226]

The Honorable,
The Secretary of the Interior.

My dear Mr. Secretary:

There is before me, by reference from you, a certain contract executed on July 1, 1925, by duly authorized members of the Board of Public Works of the City and County of San Francisco, on the one part, and by the Pacific Gas and Electric Company, a corporation acting through its Vice-President and General Manager, thereunto duly authorized, on the other part. The contract, full copy of which is hereto attached, purports to provide for the utilization of certain electric energy owned by the party of the first part through the plant and equipment of the *part* of the second part,

(Testimony of John J. Dailey.)

as a temporary expedient, the occasion being the existence of a large amount of power owned by the City and County but not now available for consumption for the reason that the City and County own no distribution system of their own. The recitals in the contract quite fully explain the occasion, the purpose, and the methods of the plan for its immediate utilization.

I am asked whether this contract is a contract of sale. The question requires determination, because section 6 of the Raker Act (Act of December 19, 1913, 38 Stat., 242), under which the City and County of San Francisco acquired a franchise to develop and has developed this power, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Assuming that the proviso refers to the franchise in its entirety ("rights hereby granted",

(Testimony of John J. Dailey.)

i. e., by the Act), and eliminating language not pertinent to the matter immediately to be considered, section 6 comes to this:

> That the grantee is prohibited from ever selling or letting to any corporation * * * * the right to sell or sub-let * * * * the electric energy sold or given to it * * * * by the said grantee.

This is a prohibition, the breach of which might be considered as a failure to observe one of the conditions specified in the Raker Act. And the proviso to paragraph "n" of Section 9 of the Act reads as follows: [227]

> That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings, in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

The City having completed the Moccasin power plant as a part of the development of the Hetch Hetchy project, it now can deliver electric energy to the extent of 420,000,000 kilo-

(Testimony of John J. Dailey.)

watt hours to a point near Newark; but Newark is several miles from the City of San Francisco. The City owns no transmission line from Newark to the City. Nor does it own any distribution system in the City. The Pacific Gas and Electric Company owns both a transmission line and a distribution system. The City has started proceedings looking to the ultimate acquisition of this system. It has at present no funds with which to purchase or to build a system of its own. Consequently, there will be a great waste of electric energy and a great loss of potential revenue therefrom to the City and to taxpayers unless some plan within the power of the grantee under its franchise, the Raker Act, is devised for its present utilization. At least two years will elapse before the City, under favorable conditions, can be the owner of a distributing system capable of marketing the power which it owns. In this situation, the contract recites, the City "employs" the Company as its temporary distributor. The City agrees to produce, deliver, and consign all its energy output (save any such portion as may be reserved for certain city requirements). The Company agrees to take the entire energy output, to connect the City's transmission line with its own at Newark, installing all necessary equipment and meters for measurement, to transmit to San Francisco through its own sys-

(Testimony of John J. Dailey.)

tem so much of the same as may be required to light the streets and to meet other municipal requirements and to supply street railroads and other consumers, to furnish all necessary peak load and steam standby service, to collect for consumers the charges which shall not exceed lawfully established rates, and to make due accounting to the City. The contract provides for the exclusion of such portion of energy as the City may be required to furnish to irrigation districts or municipalities under the terms of the Raker Act. It is agreed that the transmission and distribution losses will amount to 24 per cent of the energy consigned to the Company at Newark. To arrive at the amount of compensation which the Company should receive for its service and the amount that the City should realize from the power so developed, transmitted, and consumed, the average revenue received by the Company from consumers in San Francisco in 1924 is taken as the basis: 2.383 cents per kilowatt hour. This rate is to be applied to 76 per cent of Newark energy. The Company is to collect from consumers [228] and is to account for and pay over to the City 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of energy consigned and delivered to it at Newark. The difference, i.e., 73.065 per cent x 2.383 cents x 76 per cent of Newark energy is to be retained by

(Testimony of John J. Dailey.)

the Company as its compensation for services under the contract. On this basis the City will receive something in excess of $2,000,000 annually. The contract recites that it is a temporary arrangement between the parties for the distribution of this electric energy to cover the period that must elapse before the City is in a position to attend directly to the distribution of its product. It may be terminated at any time by either party on one day's notice. The contract, of course, covers other points, none of which, however, bears materially upon its fundamental nature; and it is with that that I am concerned.

I am unable to say that this contract effects a sale of the energy to the Company. It certainly does not so appear on its face. It is rather to be described as a contract of agency. It does not import a transfer of the property in the electric energy to the Company for a price in money. From its terms alone, I can not reach the conclusion that the Company acquires an absolute title to the power it takes over and distributes. To be sure, possession will pass to the Company, but that would be true of an agency. A sale includes not only the idea of divesting a seller of title but of vesting such title in the buyer. I can not deduce that as a fact or an intention from the sole evidence of the transaction now before me, the contract.

(Testimony of John J. Dailey.)

Time alone will develop other evidential factors which may yield a certainty in conviction on that point: e. g., the manner in which the Company deals with the consumer. Will it bill the product sold in the name of the City, or in its own name as agent of the City, or in its own name as though it were the owner? These elements, factors of decision, are not present; and there are other things, incident to management or operation, which might have a bearing. They are not now present, I must take the contract as it is.

The contract certainly provides for the delivery by the City to the Company of its property, this energy. The Company takes the consignment which is to be sold to the consumer. It appears to be much like a consignment to a commission merchant. The liability of the Company is estimated on expected proceeds; at least, it is to account on a basis that contemplates the sale of the entire product to consumers. There might be room for some argument on this point inasmuch as the amounts to be divided between the City and the Company are computed on the amount delivered and consigned, with due allowance for customary loss. But when it is considered that *all* said energy will be used, consumed, and paid for by the ultimate purchaser, this provision in the contract loses much of its significance as

(Testimony of John J. Dailey.)

pointing to a sale. It is fundamental that to con- [229] stitute a sale there must be a transfer of title. If, under this contract, the Company acquires a title to the energy the minute it receives the same at Newark, then it would have the rights of ownership and could dispose of it as it pleased. I do not think it can be said from the evidence that the terms of the contract afford that this is so. I am constrained to the conclusion, judging the matter by the only factors now in being—i.e., the conditions and the terms of the agreement—that this is not a contract of sale or lease, but rather one of agency, and that no evidence of a violation of the inhibitions of section 6 of the Raker Act is presented by this contract; and I so advise you.

Respectfully yours,

C. EDWARD WRIGHT

(Signed) C. EDWARD WRIGHT

Acting Solicitor."

WILLIS O'BRIEN,

a witness for the defendant, being first duly sworn, testified as follows:

I am Supervisor of the Utility Audit in the office of the Controller of the City and County of San Francisco. I have been in that position about two and one-half years. Prior to that time I was the supervising accountant.

(Testimony of Willis O'Brien.)

Mr. Licking: Might I ask what sort of proof is going to be offered by this witness?

Mr. Holm: Yes. We wish to show the number of bond issues that were voted by the City and County of San Francisco for the building of the entire Hetch Hetchy water supply and power project.

Mr. Licking: That is from the inception?

Mr. Holm: From the inception of the project to 19.

Mr. Licking: Do you wish to show the number of bond issues or the amount involved?

Mr. Holm: The number of bond issues and the amount.

Mr. Licking: That has been reduced to statistical form, has it not?

Mr. Holm: Yes. [230]

Mr. Licking: We will object to said proof as incompetent, immaterial and irrelevant. The issue here, as we have said, is whether the city in its present activities under this contract is violating the terms of the Raker Act, and how much money the city may have spent upon the Hetch Hetchy project as a whole before or after this contract was entered into is entirely immaterial. It certainly is irrelevant on any issue and it certainly is not competent to prove or disprove any issue in this case. The objection is on the three grounds stated.

(Testimony of Willis O'Brien.)

Mr. Holm: We desire to show the equities on both sides and to show the actual interest that the City and County has, the tremendous actual monetary interest that it has in this water and power project, and it could not exist unless this expenditure had been made. And in conformity with your Honor's suggestion of last night I thought that this would bring down gradually the entire picture of what the City and County of San Francisco did toward constructing the Hetch Hetchy water and power project.

The Court: I will allow it over the objection and subject to a motion to strike.

The Witness: I have prepared a document of the kind mentioned in the discussion between counsel. The document consisting of three pages and bearing the title "Bonded Debt Limit" written on the letterhead of the Controller of the City and County of San Francisco and purporting to have been prepared by Willis O'Brien, and countersigned by Harold J. Boyd, Controller, was thereupon offered and received in evidence and marked

(Testimony of Willis O'Brien.)

"DEFENDANT'S EXHIBIT F".

It reads as follows:

"City and County of San Francisco
Office of the Controller

BONDED DEBT LIMIT
JULY 1, 1925

Assessment Roll 1924-1925	$684,099,920	
Fifteen per cent (15%) of which equals		$102,614,988
July 1, 1925, Bonded Debt Not Matured	$76,567,400	
Less Charter exemptions, 1912 Exposition Bonds	2,800,000	73,767,400
Margin		28,847,588
Unsold bonds subject to limit		16,115,000
Limit for future issues after sale of all currently authorized bonds		12,732,588

Prepared by

(Signed) WILLIS O'BRIEN

(Signed) HAROLD J. BOYD
Controller" [231]

"HETCH HETCHY WATER SUPPLY AND POWER PROJECT
BONDED DEBT
JULY 1, 1937

Date	Int. Rate	Authorized	Sold	Redeemed	Outstanding July 1, 1937
A-1909-1-1	4.5	$ 600,000	$ 600,000	$ 600,000	$ —
B-1910-7-1	4.5	45,000,000	45,000,000	16,990,000	28,010,000*
C-1925-1-1	5.0	10,000,000	10,000,000	2,000,000	8,000,000
D-1928-7-1	4.5	24,000,000	24,000,000	—	24,000,000
E-1932-6-1	V	6,500,000	6,500,000	—	6,500,000
F-1933-12-1	4.0	3,500,000	3,500,000	525,000	2,975,000
		89,600,000	89,600,000	20,115,000	69,485,000

(Testimony of Willis O'Brien.)

Date	Annual Redemption	Serial Maturity
A-1909-1-1	$ 100,000	1909-1915
B-1910-7-1	1,000,000	1920-1964
C-1925-1-1	250,000	1930-1969
D-1928-7-1	600,000	1938-1977
E-1932-6-1	(200,000	1939-1970
	(100,000	1971
F-1933-12-1	175,000	1937-1953

*Due and unpaid July 1, 1937 $1,010,000

Various interest rates, viz:

$4,325,000 at 5.75%	$280,000 at 4.0%
1,234,000 at 5.0 %	194,000 at 3.0%
143,000 at 4.5 %	324,000 at 2.75%

The work accomplished under the various bond issues was:

A Purchase of lands, water rights, etc.

B Main dams, mountain tunnels, Cherry and Moccasin power systems, Bay Crossing pipe and Pulgas tunnel.

C Foothill tunnel and shafts in Coast Range tunnel.

D Coast Range Tunnel and San Joaquin pipe and emergency pipes.

E Completion of Coast Range tunnel and Bay Crossing pipe and making payments to U. S. Government ($250,000 per annum in accordance with supplemental agreement)

F Enlargement of O'Shaughnessy Dam to ultimate height. Estimated to be completed shortly, say January 1938.

Prepared by

(Signed) WILLIS O'BRIEN

(Signed) HAROLD J. BOYD

Controller" [232]

"HETCH HETCHY WATER SUPPLY AND POWER PROJECT
BOND INTEREST
JUNE 30, 1937

	Total	1909 4½%	1910 4½%	1925 5%
Total Coupons Paid	$40,487,820.00	$72,900	$26,882,415.00	$4,641,125.00
Less: Interest Accrued to Date of Sale of Bonds	1,041,056.61		468,152.53	89,472.36
Net Coupon Payments	39,446,763.39	72,900	26,414,262.47	4,551,652.64
Add: Coupons due and Unpaid June 30, 1937	1,536,631.25		647,932.50	203,875.00
Add: Interest Accrued Not Due June 30, 1937	38,479.37			
Total Bond Interest to June 30, 1937	$41,021,874.01	$72,900	$27,062,194.97	$4,755,527.64

	1928 4½%	1932 (Various Rates)	1933 4%
Total Coupons Paid	$ 7,088,287.50	$1,532,312.50	$270,780.00
Less: Interest Accrued to Date of Sale of Bonds	388,931.54	32,647.41	61,852.77
Net Coupon Payments	6,699,355.96	1,499,665.09	208,927.23
Add: Coupons Due and Unpaid June 30, 1937	553,095.00	80,508.75	51,220.00
Add: Interest Accrued Not Due June 30, 1937		28,562.71	9,916.66
Total Bond Interest to June 30, 1937	$ 7,252,450.96	$1,608,736.55	$270,063.89

Prepared by
(Signed) WILLIS O'BRIEN

(Signed) HAROLD J. BOYD
Controller" [233]

(Testimony of Willis O'Brien.)

The witness (continuing):

The total amount of the bond issue voted for the Hetch Hetchy project was $89,600,000.00.

In the Exhibit just received the date of the bonds is shown; for example, the bonds of the 1909 issue, January 1st, and of the 1910 issue, July 1st. Of course, the elections authorizing these bonds were held some time before. The Exhibit shows that the bonded debt limit of San Francisco on July 1, 1925, for future issue (after the sale of all currently authorized bonds), was $12,732,588.00. On the last page of the Exhibit there is a schedule which shows the total bond interest to June 1, 1937, with the detail there as to the issues. The grand total of interest that has been paid is $41,021,874.01.

IGNATIUS DWYER,

a witness for the defendant being first duly sworn, testified as follows:

I am Chief Deputy Registrar of Voters of the City and County of San Francisco. I have held that position for about twenty-five years. I have prepared and have with me a statement showing the number of bond issues that were proposed to the voters of the City and County of San Francisco for the Hetch Hetchy project, as well as the revenue bonds by which ex-

(Testimony of Ignatius Dwyer.)

tensions could have been built and charter amendments relating to the same subject. The statement is dated October 18, 1937, and is signed by C. J. Collins, Registrar of Voters, and certified under seal.

Counsel for the defendant then offered said statement in evidence. Counsel for the plaintiff objected to the offer. Thereupon the following occurred:

Mr. Licking: I object to the evidence as embodied in this memorandum on the ground that as a whole and considered singly, the sum of the items, nor any of the items of the information themselves constitute matter that is either material or relevant to any issue before the Court, or competent to prove or disprove any allegation in the complaint or in the answer. This is a matter of what the city has done. This is an attempt to show what the city has done, in an attempt to do something else instead of that which it is now doing, and that which it is now doing is the thing which is before the Court, and it seems to me clearly that all of these attempts that the city may have made to do something are certainly immaterial to the issue whether what the city is doing is in violation of the Raker Act. I object on [234] the ground stated.

Mr. Holm: In addition to the ground that I have heretofore stated as to the admission

(Testimony of Ignatius Dwyer.)

of this general information for the Court and for the record to be hereafter maintained in this case, I feel that this is quite competent evidence. It shows that every effort was made in behalf of the City and County of San Francisco to actually acquire a distribution system of its own, and it shows, and after explanatory statements have been made by this witness, will show what the issues were proposed for, and it is quite material and relevant to the conduct of the Hetch Hetchy water and power system.

The Court: The Court cannot conceive that this has any relation to any issue here involved in this case. If it has I would like to have someone point it out.

Mr. Holm: It has been suggested by Secretary Ickes that these very steps would be agreeable to him, and further than that, it shows the constant acts on the part of the City and County of San Francisco to reasonably comply, as I stated, with the Raker Act; and upon that theory I think, under the ruling of your Honor last evening, it should be accepted in evidence.

Mr. Licking: There is no evidence before the Court that the Secretary suggested anything of the sort, unless it came in at some time I was out of the courtroom; and I do not remember having been out of the courtroom. It would seem to me that such a suggestion would

(Testimony of Ignatius Dwyer.)

not be germane or material if it had been made. But it seems to me that whether a reasonable compliance is concerned, if it is material at all, it would be proper to show that they wanted to do something else besides what it was doing. But I cannot see what relevancy that has to the question before the Court, that is, what they are doing, not what they tried to do. This is an attempt to prove what the city tried to do. I have not any doubt that there have been various bond issues and one thing and another, but I cannot see that the good faith of the city in attempting to do something else except what it is doing has anything to do with the question before us.

The Court: I will sustain the objection.

Counsel for the defendant thereupon duly excepted to said ruling of the Court. Said ruling and exception are hereby designated Ruling and Exception No. 12.

The statement which was the subject matter of said ruling was thereupon marked, for identification, as

(Testimony of Ignatius Dwyer.)

"DEFENDANT'S EXHIBIT G"

for identification. It reads as follows: [235]

"Power Distribution Propositions"	Vote For	Vote Against	Total	Vote Necessary to Carry
November 8, 1927. $2,000,000 Transmission line bonds	57,607	55,940	113,547	75,698
November 6, 1928 Revenue bonds Charter Amendment.	26,076	103,495	129,571	64,786
August 26, 1930 Purchase— Pacific Gas & Electric Co. *$44,600,000	25,383	63,638	89,021	59,348
Purchase Great Western Power *$18,945,000	25,256	63,387	88,643	59,096
Transmission line from Newark *$3,525,000	25,788	61,972	87,760	58,507
Red Mountain Bar Hydro-Electric Plant *$1,045,000	26,001	61,422	87,423	58,282
Total *$68,115,000				59,348
November 8, 1932 Loans Payable from Water Revenue. Charter Amendment	66,532	89,220	155,752	77,877
November 7, 1933 Red Mountain Power Plant and San Francisco Distributing System	71,746	73,010	144,756	96,504
May 2, 1935 Revenue Bonds Charter amendment	50,804	72,780	123,584	61,793
March 9, 1937 Revenue Bonds Charter Amendment	65,762	78,101	143,863	71,932

(Testimony of Ignatius Dwyer.)

I hereby certify that the above is a true and correct copy of the votes cast for and against each Proposition Bond and Charter Amendment on the respective dates stated above.

(Sgd.) C. J. COLLINS

Registrar of Voters

San Francisco

October 18, 1937. (Seal)." [236]

Thereupon, in connection with said "Exhibit G for Identification", counsel for the defendant asked that portions of seven several pamphlets dealing with propositions to be voted on at elections to be held November 8, 1927, November 6, 1928, August 26, 1930, November 8, 1932, November 7, 1933, May 2, 1935 and March 9, 1937, respectively, which were explanatory of said "Defendant's Exhibit G for Identification" and of the ten proposals voted upon at the elections therein mentioned, be considered as offered in connection with said Exhibit and marked as a part thereof for the purpose of identification. Said pamphlets were thereupon marked as part of said "Defendant's Exhibit G for Identification."

The portions of said respective pamphlets so offered as part of

"DEFENDANT'S EXHIBIT G

for Identification" and the proposition with which the same were concerned, are as next stated:

(a) Pages 53 to 59, inclusive, of the first of said pamphlets, dealing with a proposition (No.

(Testimony of Ignatius Dwyer.)

3) to be voted upon at said election of November 8, 1927. Said proposition was one to incur a bonded debt of the City and County of San Francisco to the amount of $2,000,000.00 for the purpose of acquiring, constructing and completing an extension of the Moccasin Creek power line of the Hetch Hetchy water and power project of said City and County of San Francisco from its then terminal at Newark, Alameda County, California, over, under, across or around the Bay of San Francisco, and thence by the most feasible route into the City and County of San Francisco, for the purpose of transmitting electric energy generated at Moccasin Power Plant into the City and County of San Francisco.

(b) Pages 18 to 24, inclusive, of the second of said pamphlets, dealing with a proposed Charter Amendment (No. 23), to be voted upon at said election of November 6, 1928. Said proposed Charter Amendment provided for the acquisition, construction or extension of public utilities and the issuance of bonds therefor which should be payable both as to principal and interest wholly from the revenues of said utility.

(c) Pages 4 to 13, inclusive, of the third of said pamphlets, dealing with a proposition (No. 1) to be voted upon at said election of August 26, 1930. Said proposition was one to

(Testimony of Ignatius Dwyer.)

incur a bonded debt of the City and County of San Francisco, to the amount of $44,600,000.00 for the acquisition of the electric [237] generating and distribution system of Pacific Gas and Electric Company and all lands of said Company within and without the confines of the City and County of San Francisco, and all its properties and equipment necessary for the conduct of such system.

(d) Pages 14 to 23, inclusive, of the third of said pamphlets, dealing with a proposition (No. 2) to be voted upon at said election of August 26, 1930. Said proposition was one to incur a bonded debt of the City and County of San Francisco to the amount of $18,945,000.00 for the acquisition of the electric generating and distributing system of The Great Western Power Company of California, and all lands of said Company within and without the confines of the City and County of San Francisco, and all of its properties and equipment necessary for the conduct of such system.

(e) Pages 24 to 33, inclusive, of the third of said pamphlets, dealing with a proposition (No. 3), to be voted upon at said election of August 26, 1930. Said proposition was one authorizing the incurring of a bonded debt of the City and County of San Francisco, in the sum of $3,525,000.00 for the purpose of acquiring, constructing and completing a double circuit high volt-

(Testimony of Ignatius Dwyer.)

age electric transmission line from Newark, Alameda County, California, to the City and County of San Francisco, and all necessary rights of way therefor, to raise the transmission voltage of the Pacific Gas and Electric Company's stepdown station in Visitacion Valley, San Mateo County, California, adequate to handle the electric power generated from the plants of the City and County of San Francisco; and to regulate voltage, correct power factor, stabilize lines and other related and incidental matters.

(f) Pages 34 to 42, inclusive, of the third of said pamphlets, dealing with a proposition (No. 4) to be voted upon at said election of August 26, 1930. Said proposition was one authorizing the incurring of a bonded debt of said City and County to the amount of $1,045,000. for the acquisition, construction and completion of the lands, power house and all necessary equipment, materials and supplies for the purpose of developing hydro-electric energy at Red Mountain Bar in Tuolumne County, California, where the Hetch Hetchy aqueduct of the City and County of San Francisco passes under the Don Pedro Reservoir.

(g) Pages 12 to 17, inclusive, of the fourth of said pamphlets, dealing with a proposed Charter Amendment (No. 4), to be voted upon at said election of November 8, 1932. Said pro-

(Testimony of Ignatius Dwyer.)

posed Charter Amendment would add a new section 129.1 to the Charter of the City and County of San Francisco, which would permit the Public Utilities Commission to borrow money for the construction or reconstruction of improvements to the Water Department to the extent of $5,000,000.00, to be repaid [238] solely out of the revenue of said utility.

(h) Pages 11 to 14, inclusive, of the fifth of said pamphlets, dealing with a proposition (No. 3) to be voted upon at said election of November 7, 1933. Said proposition was one to incur a bonded debt of the City and County of San Francisco in the sum of $6,308,000.00 for the construction of a power plant at Red Mountain Bar in Tuolumne County, California, and a system in the City and County of San Francisco, for the distribution of the electric energy generated on the Hetch Hetchy system, including necessary substations and standby plants, lands and rights of way.

(i) Pages 3 to 13, inclusive, of the sixth of said pamphlets, dealing with a proposition (No. 1) to be voted upon at said election of May 2, 1935. Said proposition was one to amend the Charter of the City and County of San Francisco by adding thereto a new section to be numbered Section 121.1 providing for the acquisition, construction and completion or extension of public utilities by funds provided by

(Testimony of Ignatius Dwyer.)

the issuance of bonds or other obligations, the principal of which, and the interest on which, would be payable wholly from the net revenues of the utilities so acquired or extended.

(j) Pages 2 to 9, inclusive, of the seventh of said pamphlets, dealing with a proposed Charter Amendment (No. 1), to be voted upon at said election of March 9, 1937. Said proposed Charter Amendment would amend the Charter of the City and County of San Francisco by the addition of a new section to be numbered 121.1 providing for the borrowing by the Public Utilities Commission of the City and County of San Francisco through the issuance of revenue bonds or other evidences of indebtedness payable wholly out of revenue, in such amount or amounts, as might, in the judgment of said public utilities commission, be necessary to meet the cost of acquiring a system for the generation and distribution to the people of the City and County of San Francisco or to the people of any territory adjacent to or adjoining said city and county, of the hydro-electric power generated in the Hetch Hetchy project, up to but not exceeding in the aggregate the sum of $50,000,000.00.

Because of their length it is impracticable herein to set forth in full the ten propositions voted upon at the seven elections above mentioned, as contained in said seven pamphlets, or to state the substance

(Testimony of Ignatius Dwyer.)

of said propositions more specifically than they are hereinbefore stated. All of the provisions of said respective propositions are incorporated herein, by reference; however, and the original pamphlets [239] containing the same (which, with the aforesaid statement of C. J. Collins, Registrar of the City and County of San Francisco, California, dated October 18, 1937, constitute "Defendant's Exhibit G for Identification"), will be physically transmitted to the United States Circuit Court of Appeals with and as a part of the record on appeal.

WILLIAM H. NANRY,

a witness for the defendant, being first duly sworn, testified as follows:

I am a resident of San Francisco and I am Director of the San Francisco Bureau of Governmental Research, the function of which is to act as a taxpayers' agency in the interest of economy and efficiency in the City Government. Part of the function of the Bureau and of my duties is to familiarize myself with the records of the City Government pertaining to its bond capacity, tax rates, income and expenditures and the various projects that the City has under consideration in its governmental capacity. I have prepared a statement showing the assessment roll, debt limitation,

(Testimony of William H. Nanry.)

bonded debt subject to limitation and the leeway for new debts of the City and County of San Francisco for the years 1924, 1925 to date, as shown by the records of the Controller of the City and County of San Francisco. Said statement correctly sets forth the results of the compilation.

Thereupon the following occurred:

Mr. Searls: I desire to offer this exhibit in evidence, showing the leeway that the city has had for each of these years, the bonded debt by which it might acquire a publicly-owned distribution system.

Mr. Licking: To which I object upon the ground that whether the City and County of San Francisco is or has been in a position to acquire a publicly-owned distribution system or whether it should is not in issue in this case. It is utterly irrelevant, and immaterial.

The Court: The objection is sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 13.

[240]

Said statement was thereupon marked for identification as

(Testimony of William H. Nanry.)

DEFENDANT'S EXHIBIT H

for Identification"; it reads as follows:

"[October 1937]

(a)	Assessment Roll	Debt Limitation	Bonded debt Subject to Limitation	Leeway for New Debt	Non Limit Debt Charge on Taxpayers
1924-25	$684,099,920	$102,614,988	$89,823,400	$12,791,588	
1927	Bonds Authorized	Memorial Hall		4,000,000	
		Bernal Cut		1,400,000	
		Boulevard		9,380,000	
1928		Hetch Hetchy			$24,000,000
1929		Hospital		3,500,000	
		Sewer		2,200,000	
		sub-total		20,480,000	24,000,000
(b)					
1929-30	1,196,439,062	143,572,687	53,009,400	90,563,287	
1931	Bonds Authorized	sub-total above		20,480,000	24,000,000
		County Jail		850,000	
		Unemployment, Park, Playground, Streets		2,500,000	
1932		Relief		6,500,000	
		Hetch Hetchy			6,500,000
1933		Sewers		2,625,000	
		High Pressure		2,000,000	
		Airport		260,000	
		School		3,000,000	
		total		38,215,000	30,500,000
(c)					
1937-8	991,119,933	118,934,392	48,706,600	70,227,792"	

(Testimony of William H. Nanry.)

Thereupon the following occurred:

Mr. Searls: Q. Mr. Nanry, assuming that the in- [241] come from the hydro-electric energy marketed through the contract in question has averaged something in excess of $2,200,000 annually per year, can you state what the net effect upon the taxpayers of San Francisco would be if there was a cancellation of this contract and that income were cut off?

At the request of the Court, after objection to said question had been made by counsel for the plaintiff, on the ground that the proposed testimony was incompetent, irrelevant and immaterial, counsel for the defendant made the following statement of the purpose for which said offer was made:

Mr. Searls: The purpose of the offer is to show the balance of equities in this situation, that the City of San Francisco and its taxpayers will suffer a tremendous loss if your Honor should grant an injunction in this case, that the Government will suffer no loss whatever, and that in a case where there is a doubt as to the meaning or construction of a provision of the statute or a contract, the court should take into consideration the effect of injunctive relief upon the parties.

Whereupon the Court overruled the objection of counsel for the plaintiff, subject to a motion to strike out the witness's answer.

(Testimony of William H. Nanry.)

(The Witness): If that income would not be available from the agency agreement it would have to be made up by taxation and would require an increase of about 28 cents in the tax rate; that is 28 cents for $100.00 of assessed valuation, based upon the current assessment roll of the City and County of San Francisco.

In connection with the testimony of the witness, counsel for the plaintiff stated that he did not object to the questions put to the witness on the ground of any lack of qualification of the witness.

PAUL J. OST,

a witness for the defendant, being first duly sworn, testified as follows:

At the present time, I am Manager and Chief Engineer of the Electrical Power Bureau of the Public Utilities Commission. I have been in the city's employ between twenty-eight and twenty-nine years. My position is that of electrical engineer.

Counsel for the plaintiff thereupon stipulated that the witness [242] was competent to testify as an expert on electrical engineering matters.

The witness (continuing):

In connection with my work on the Hetch

(Testimony of Paul J. Ost.)

Hetchy project I have become familiar with the power construction features of that project.

Thereupon the following occurred:

Mr. Searls: Q. Prior to the making of this contract between the City and County of San Francisco and the Pacific Gas & Electric Company did you cause an inquiry to be made of the Modesto & Turlock Irrigation Districts as to whether it desired to purchase any electrical energy from the City and County of San Francisco in conformity with the provisions of Section 9 (l) of the Raker Act?

At the request of the Court counsel for the defendant read Section 9 (l) of the Raker Act.

Thereupon there was a discussion by counsel for plaintiff and counsel for the defendant with respect to the pending question. In the course of said discussion a recess was taken until Thursday, October 21, 1937, at ten o'clock A.M.

Thursday, October 21, 1937, 10 o'clock A.M.

The discussion was resumed by counsel. [243]

Counsel for the defendant thereupon offered in evidence a photostatic copy of Resolution No. 23723 (New Series) of the Board of Supervisors of the City and County of San Francisco, in connection with said offer summarized the provisions of said resolution. In so doing, he stated that said resolution solicited offers for the purchase of the whole or part of any electric energy of the Hetch Hetchy

(Testimony of Paul J. Ost.)

project by any municipality, municipal water system or irrigation district, delivery to be made at any point on the Hetch Hetchy transmission line at the voltage and frequency mentioned in the preamble and further stated that the solicitation contained in the resolution was made prior to the execution of the contract of July 1, 1925.

Counsel for the plaintiff objected to said offer, upon the ground that the Resolution is irrelevant, incompetent and immaterial, and not within the issue of the case.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 14.

The resolution, which was the subject matter of said ruling was thereupon marked for identification as

"DEFENDANT'S EXHIBIT I for Identification"; it reads as follows:

"RESOLUTION No. 23723 (NEW SERIES), as follows:

Whereas, the City Engineer has reported that on or shortly after April 1, 1925, there will be available for delivery at Newark, California, 360,000,000, more or less, kilowatt hours annually, of three-phase electric energy to be generated at the Moccasin Creek Power House on the Hetch Hetchy project (assuming a load factor

(Testimony of Paul J. Ost.)

of 65 per cent), said energy having a voltage of 154,000 volts and a frequency of 60 cycles; and

Whereas, the Raker Act requires the City and County to sell or offer for sale so much of said electric energy, as is not required for municipal purposes under certain limitations prescribed in said act; now, therefore,

Resolved, That the City and County of San Francisco does hereby solicit offers for the purchase of the whole or any part of said electric energy by any municipality, municipal water district or irrigation district, [244] delivery to be made at any point on the Hetch Hetchy transmission line at the voltage and frequency mentioned in the preamble hereof, and any contract to be subject to the terms and conditions of the Act of Congress of December 19, 1913, commonly known as the Raker Act. Such offers must be presented in writing to the Board of Supervisors, City Hall, San Francisco, on or before the 30th day of March, 1925, at 3 o'clock p. m., and must be accompanied by a statement of the plan and arrangements which the bidder contemplates following in taking delivery of said energy and transmitting the same to the place of intended use. Be it

Further Resolved, That the Clerk of the Board be and he is hereby directed to advertise this offer for ten days in the official newspaper.

(Testimony of Paul J. Ost.)

Adopted by the Board of Supervisors, Marc 9, 1925.

Ayes—Supervisors Badaracco, Bath, Colman Deasy, Harrelson, Hayden, Katz, McGregor Morgan, Robb, Roncovieri, Rossi, Schmitz Shannon, Welch, Wetmore—1*y*.

Absent—Supervisors McLaren, McSheehy—2

J. A. DUNNIGAN

Clerk.

Approved March 11, 1925.

R. McLERAN,

Acting Mayor."

Counsel for the defendant next offered in evidence a certified copy of resolution No. 21398 (New Series), of the Board of Supervisors of the City and County of San Francisco, and, in connection with said offer, summarized the provisions of said resolution. In so doing he stated that the Resolution directed the City Engineer to ascertain from the power companies operating in San Francisco the terms under which the total output in electrical energy from the Hetch Hetchy project could be marketed through an agency agreement and the price at which each corporation would grant an option to the City to buy its distribution system and standby plants and whether it would be willing to sell its distribution system and standby plants on a pay-as-you-go plan.

(Testimony of Paul J. Ost.)

Counsel for the plaintiff objected to the offer on the ground that said Resolution was irrelevant, incompetent and immaterial, and not within the issues of the case. [245]

In response to a request by the Court for a statement of the purpose of the offer, counsel for the defendant made the following statement:

> Mr. Searls: The purpose of the offer is to show an attempt of the City and County of San Francisco to complete the distribution of electric energy under terms that might be most favorable to the city, including the acquisition of a publicly owned plant by purchase from the corporation which owned it.

The Court sustained the objection to said Resolution, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are hereby designated as Ruling and Exception No. 15.

Thereupon the Resolution which was the subject of said ruling was marked as

"DEFENDANT'S EXHIBIT J

for Identification". It reads as follows:

"RESOLUTION No. 21398 (NEW SERIES), as follows:

Whereas, The City and County of San Francisco is confronted with the problem of determining what disposition shall be made of the 82,500 kilowatt output of hydro-electric energy

(Testimony of Paul J. Ost.)

to be generated at the Moccasin Creek power plant on the Hetch Hetchy project prior to December 31, 1924, and transmitted over the City's transmission line to the bay region; and

Whereas, The City Engineer has recommended in his report dated April 4, 1923, that as an aid in deciding this question information be obtained from the Pacific Gas and Electric Company and Great Western Power Company as to the terms upon which said electric energy can be marketed through said corporations, or either of them, if it should be decided to market it through private agencies;

Whereas, It seems equally necessary to ascertain and know the prices at which the distribution systems in San Francisco of each of said corporations could be acquired by the City and County, if it should be decided to market said electricity through a system to be acquired and owned by the City itself; now, therefore, be it

Resolved, That the City Engineer be and he is hereby requested and directed to ascertain from each of said power companies and report to this Board at the earliest possible moment;

(1) The terms under which the total output in electric energy from the Hetch Hetchy project could be marketed through the agency of either or both of said corporations [246] for a period not exceeding ten years from and after the same shall be available for distribution.

(Testimony of Paul J. Ost.)

(2) The price at which each of said corporations would be willing to sell to the City and County of San Francisco such portions of its distribution system in said City and County as may, in the opinion of the City Engineer, be adapted to the distribution by the City of such electric energy, including the necessary plants for furnishing steam standby service.

(3) The period of time for which each of said corporations would be willing to grant an option to the City and County to purchase said distribution system and standby plant at said prices.

(4) Whether or not either of said corporations would be willing to sell their said local distributing systems and standby plants to the City and County on a pay-as-you-go plan, and, if so, on what terms; and be it

Further Resolved, That the City Engineer be and he is hereby further requested to furnish this Board with an itemized estimate of the cost of building a complete distribution and standby system for the marketing and distributing of said electric energy independently of existing plants.

Adopted by the Board of Supervisors July 30, 1923.

Ayes: Supervisors Bath, Colman, Deasy, Hayden, McGregor, McLeran, McSheehy, Mor-

(Testimony of Paul J. Ost.)

gan, Mulvihill, Robb, Rossi, Schmitz, Scott, Shannon, Welch, Wetmore—16.

Absent: Supervisors Hynes, Powers—2.

J. S. DUNNIGAN,

Clerk.

Approved August 7, 1923.

JAMES ROLPH, JR.,

Mayor."

Counsel for the defendant next offered in evidence the correspondence between the City and the Pacific Gas and Electric Company and Great Western Power Company with respect to the City's solicitation of offers from said power companies in accordance with the aforesaid Resolution. Counsel for the plaintiff objected to said offer upon the ground that it was incompetent, irrelevant and immaterial, and not within the issues of the case. The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 16. [247]

Said correspondence consists of a letter from the City Engineer of San Francisco to each of the power companies named above, and the replies of said respective power companies to said respective letters. Said letters were collectively marked for identification as

(Testimony of Paul J. Ost.)

"DEFENDANT'S EXHIBIT K

for Identification"; they read respectively as follows:

"City and County of San Francisco
Department of Public Works
Bureau of Engineering

August First
1923

Office of
Hetch Hetchy Water Supply
Hetch Hetchy Railroad

Pacific Gas and Electric Company
140 Sutter Street
(Attention Mr. Wigginton Creed)
and
Great Western Power Company of California
530 Bush Street
San Francisco, California
(Attention Mr. Mortimer Fleishhacker)

Gentlemen:

By resolution of the Board of Supervisors of the City and County of San Francisco adopted July 30, 1923, I am requested and directed to confer with your company with a view to ascertaining the following information affecting the distribution of hydro-electric power from the Moccasin Creek plant on the Hetch Hetchy Project:

1. The terms under which the total output in electric energy from the Hetch Hetchy pro-

(Testimony of Paul J. Ost.)

ject could be marketed through the agency of your company for a period not exceeding ten years from and after the same shall be available for distribution;

2. The price at which your company would be willing to sell to the City and County of San Francisco such portions of its distribution system in said City and County as may, in the opinion of the City Engineer, be adapted to the distribution by the City of such electric energy, including the necessary plants for furnishing steam standby service;

3. The period of time for which your company would be willing to grant an option to the City and County to purchase said distribution system and standby plant at said prices;

4. Whether or not your company would be willing to sell its local distributing system and standby plants to the City and County of San Francisco on a pay-as-you-go [248] plan, and if so, on what terms.

In pursuance of this direction from the Board of Supervisors I shall be glad of an opportunity to confer with you with a view to outlining the general principles which will govern your company in supplying the information requested, and also to establishing some satisfactory line of procedure for working out the desired data.

(Testimony of Paul J. Ost.)

I shall ask one or more of my assistants and Mr. Searls, our legal advisor, to attend the conference with me, if you will kindly designate a date and hour which will be convenient to you.

Yours very truly,
(Signed) M. M. O'SHAUGHNESSY,
City Engineer."

"Great Western Power Company
of California
530 Bush Street
San Francisco

September 7, 1923.

Mr. M. M. O'Shaughnessy
City Engineer
City Hall, Civic Center
San Francisco, California

Dear Sir:

Your letter of August 1st, requesting information in reference to the disposal of the hydro-electric power from the Moccasin Creek Plant of the Hetch Hetchy Project, has been receiving our earnest attention.

Answering the first question of your letter, from the information we have at hand it would appear that the total output from the Moccasin Creek Plant is worth approximately $2,000,000

(Testimony of Paul J. Ost.)

per annum, and on this basis this Company would consider purchasing a substantial portion for distribution.

This plan would immediately place the Hetch Hetchy Project on a revenue producing basis, and eliminate the long period of many years duration which the City would require for building up and connecting a load to a new distribution system.

We have been giving considerable study to the possibility of the sale to the City and County of San Francisco of the distribution system of this Company lying within the City and County, including the standby steam generating plants. [249]

The determination of proper severance charges has assumed a position of extreme importance in placing a total value on these properties. The physical problem involving separation of the steam heat system properties, the San Mateo County distribution properties which are served through the San Francisco system, and the many legal and financial questions involved on account of all our properties being covered by bond issues, all combined to make it extremely difficult to arrive at a definite answer, and we cannot give one at this time.

We wish to assure you of our earnest desire to be helpful to you and the City and County

(Testimony of Paul J. Ost.)

in working out the problem which you are facing in connection with the above matter.

Very truly yours,

(Signed) J. B. BLACK

Vice President and General Manager."

JBB:U

"Pacific Gas and Electric Company
445 Sutter Street
San Francisco, California

September 9, 1923

Wigginton E. Creed
President

M. M. O'Shaughnessy, Esq.
City Engineer of San Francisco
San Francisco, California

Dear Sir:

We have given full and careful consideration to the request contained in your letter of August 1, 1923, for information related to the distribution of electric energy generated at the Moccasin Creek plant of the Hetch Hetchy project, and submit to you herewith our answer.

1. For many years this company has marketed and distributed, in addition to its own large supplies, the surplus electric power of other companies and even of isolated generating plants. This policy, by consolidating and coordinating effort, has proved to be a potent factor in placing California in a premier posi-

(Testimony of Paul J. Ost.)

tion in the power industry. We are ready, if the city wishes it, to continue this policy as to any power which the city may find it desirable to market. If the city should decide to market its power through the medium of an existing public utility, it seems to us that agreement should be reached through negotiations by representatives of the city, vested with the necessary power to act, with representatives of the public utility. It is our belief that such an arrangement would bring to the city a revenue of not less than $2,000,000.00 per an- [250] num, dependent upon the precise disposal of technical details.

2. We are not in a position to offer our distributing system in the city of San Francisco for sale.

The generating, transmission and distribution system of this company has been developed through a long period of years until it constitutes today an integrated whole designed for and devoted to the service not simply of territory within municipal boundaries but of a great section of the State of California without regard to municipal boundaries, and service in any one portion of this section of the state is directly related to service in every other portion thereof.

3. You, of course, appreciate that the answer given to your Question No. 2 serves fully

(Testimony of Paul J. Ost.)

to answer your Questions Nos. 3 and 4.

Respectfully submitted,

(Signed) WIGGINTON E. CREED

President."

Counsel for the defendant next offered in evidence a certified copy of Resolution No. 21,178 (New Series) of the Board of Supervisors of the City and County of San Francisco, declaring that said City and County, in entering into the contract of July 1, 1925, would, notwithstanding said contract, always stand ready to serve the Modesto and Turlock Irrigation Districts under the terms of the Raker Act.

In connection with said offer counsel for the defendant stated that in response to the previous solicitation to said Modesto Irrigation District contained in "Defendant's Exhibit I for Identification" said District had replied stating that it might require standby service some day, and that the contract of July 1, 1925 ("U. S. Exhibit No. 6") contains a proviso that if the City is ever required to furnish power to said Irrigation District, the amount required therefor may be excepted from the contract.

Counsel for the plaintiff objected to the offer of said Resolution [251] No. 21,178 (New Series) upon the ground that it was incompetent, irrelevant and immaterial, and not within the issues of the case.

At the request of the Court, counsel for the

(Testimony of Paul J. Ost.)

defendant read Section 2 of the contract of July 1, 1925 ("U. S. Exhibit No. 6").

Supplementing the objection theretofore made to the offer of said Resolution, counsel for the plaintiff further objected to said Resolution upon the ground that it was merely a declaration of policy by the City of San Francisco.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 17.

Said Resolution which was the subject of said ruling was thereupon marked for identification as

"DEFENDANT'S EXHIBIT L"

for Identification". It reads as follows:

"RESOLUTION No. 21178. (NEW SERIES.)

Whereas, The City and County of San Francisco is under legal obligations, under the terms of Section 9, subdivisions L and M of the Act of Congress of December 19, 1913, commonly known as the Raker Act, to sell to the Modesto and Turlock Irrigation Districts, upon their request, and also to municipalities within either or both the said Irrigation Districts, electrical energy for irrigation and public municipal purposes within those Districts, at prices to be fixed under the laws of California or in the absence of such laws, at prices approved by

(Testimony of Paul J. Ost.)

the Secretary of the Interior, said prices not to be less than will return to the City of San Francisco the actual total costs of providing and supplying said power, said cost to be computed in accordance with currently accepted practice of public cost accounting, including a fair proportion of the cost of conduits, lands, dams, and water supply system, and said prices not to be greater than those which will actually reimburse the City and County of San Francisco for developing and maintaining and transmitting electrical energy thus sold; and

Whereas, The Board of Directors of the Modesto Irrigation District has requested the City and County of San Francisco to make a declaration of the policy which it will follow with respect to fulfilling its obligations toward said District under said terms of the Raker Act, with special reference to the furnishing of a standby service to said District at a point therein, to be hereafter selected, and also to supplying such electrical energy as may be [252] needed by said District during periods of low water or water shortage at the Don Pedro power house; and

Whereas, The City Engineer has reported to this Board that the City can make such a declaration of policy without imperiling or handicapping its interests in future arrange-

(Testimony of Paul J. Ost.)

ments for the disposal of the hydro-electric power generated on the Hetch Hetchy project;

Now, Therefore, Be It Resolved, That it will be the policy of the City of San Francisco to furnish such standby electric service as may be required by the Modesto Irrigation District and such electric energy as may be required by said District, not exceeding amounts to be hereafter agreed upon, the terms and conditions under which such service shall be rendered to be a matter for future negotiation between the representatives of the District and those of the City and County of San Francisco; be it further

Resolved, That any policy which the City and County of San Francisco shall hereafter adopt with reference to the disposal of hydro-electric energy generated on the Hetch Hetchy Project shall have due regard to the service to the Modesto Irrigation District herein provided for; and be it further

Resolved, That the Clerk of the Supervisors be and he is hereby directed to transmit a certified copy of this Resolution to the Board of Directors of the Modesto Irrigation District.

Adopted—Board of Supervisors, San Francisco, May 28, 1923.

Ayes: Supervisors Bath, Colman, Deasy, Hayden, Hynes, McGregor, McLeran, Mc-

(Testimony of Paul J. Ost.)

Sheehy, Morgan, Mulvihill, Powers, Robb, Rossi, Schmitz, Scott, Shannon, Welch, Wetmore.

J. S. DUNNIGAN,

Clerk.

Approved, San Francisco, May 29, 1923.

R. McLERAN,

Acting Mayor."

The witness Mr. Ost (Continuing):

The Early Intake plant was placed in operation in the Spring of 1928 for the purpose of supplying power in the construction of the O'Shaughnessy Dam and in driving the aqueduct tunnels in connection with the development of the Hetch Hetchy water. The amount of power taken from that plant fluctuated quite widely as demands for construction power came on or went off. That condition resulted in there being surplus power practically at all times.

[253]

In or about the year 1918, the City Engineer of San Francisco received an order from Federal Power Administrator of California with respect to that power.

Upon receipt of that order the City made a connection with the line of the Sierra and San

(Testimony of Paul J. Ost.)

Francisco Power Company through this connection. The Sierra and San Francisco Power Company was subsequently merged with or purchased by Pacific Gas and Electric Company.

The witness thereupon identified a photostatic copy of a document dated September 18, 1918, signed by H. G. Butler, as the order referred to, and stated: "That is the document Mr. Butler delivered to me". He was the Federal Power Administrator during the War.

Counsel for the defendant thereupon offered said document in evidence and it was received in evidence and marked

"DEFENDANT'S EXHIBIT M";

it reads as follows:

"Railroad Commission
of the
State of California
Tenth Floor, Commercial Building
833 Market Street
San Francisco
Office of Power Administrator

470-5

Edwin O. Edgerton, Commissioner, Pres.
H. D. Loveland, Commissioner
Alex Gordon, Commissioner

(Testimony of Paul J. Ost.)

Frank R. Devlin, Commissioner
Harry A. Encell, Examiner
Myron Westover, Examiner
R. A. Pabst, Asst. Secretary
W. P. Geary, Rate Expert
Richard Sachse, Chief Engineer
L. R. Reynolds, Auditor
W. C. Fankhauser, Bond Expert
Douglas Brookman, Attorney

Telephone Sutter 2260
Address All Communications to
Railroad Commission of the State
of California

September 18, 1918.

Mr. M. M. O'Shaughnessy, City Engineer,
City of San Francisco,
City Hall,
San Francisco, California.

Dear Sir:

I am advised that you have available considerable electric energy at the power plant built for the construction of the Hetch Hetchy project. The Sierra and San Francisco Power Company informs me that it has a line which can [254] transmit part or all of this energy.

In view of the present power shortage and the imperative need of making use of all the power available in order to protect shipbuild-

(Testimony of Paul J. Ost.)

ing and other essential war industries, you should at once make arrangements to turn this power over to the Sierra and San Francisco Power Company so that it will be available for general use.

This letter should be construed as a formal order to that effect.

Yours truly,

(Signed) H. G. BUTLER

HGB:FMc Power Administrator."

The witness continuing:

The Early Intake plant is approximately twenty miles from Priest. There was a technical advantage from an engineering point of view, in having the power from the Early Intake delivered at Priest into the lines of the Sierra and San Francisco Power Company. The latter lines serve a number of communities and mines, and between its closest generating plant and Priest the line was a very light one and the service was very poor, and by procuring this connection it gave good service to the consumers taking power off of that extension.

Conversely, we had trouble in maintaining the Early Intake plant in continuous operation. This was due to two or three reasons. First,

(Testimony of Paul J. Ost.)

there were times when there was a failure of water due to the dryness of the season; there were one or two cases where unavoidable accidents occurred which cut off the delivery of water to the power house, and, therefore, this connection served as a standby to permit the continuation of construction while the plant was out of order.

As the construction work tapered off on the Mountain Division of the Hetch Hetchy project, our surplus power at the Early Intake plant in a larger quantity continued to be delivered to the Sierra and San Francisco system. Later, the delivery from the Early Intake was diverted from the Moccasin Power Plant into the transmission lines which extended from Moccasin to San Francisco, and a direct connection was made between the Early Intake and the Sierra system, later taken over by the Pacific Gas and Electric Company.

We are still using the Early Intake plant for construction purposes.

I recognize the three statements shown me marked May 31, 1937, June 30, 1937 and July 31, 1937, respectively. They are the forms of bill made out against Pacific Gas and Electric Company for the electric energy of the Hetch Hetchy project, delivered to the Company at Newark. These [255] bills are sent out by the City monthly.

(Testimony of Paul J. Ost.)

Counsel for the defendant thereupon offered in evidence the three bills mentioned and identified by the witness, and in connection with the offer stated that it was made merely for the purpose of showing the form of the bills and that the amount of none of the bills was significant. Said bills were thereupon received in evidence, and collectively marked

"DEFENDANT'S EXHIBIT N".

In the order of their dates, they read, respectively, as follows:

Pacific Gas and Electric Co.
San Francisco, California
to Electric Power Bureau, Dr.
Public Utilities Commission
425 Mason Street, Room 610
Telephone PRospect 7000
San Francisco, California.

	Memo Only		
June 1937—Delivered at Newark		40,066,600 KWH	
Losses 24%		9,615,744 "	
			30,449,856 KWH
Revenue at $0,02383	725,620.07		
Company's Compensation 73.065%	530,174.30		
		$195,445.77	

Received Payment
July 9, 1937.

Dr. Acct. 3200	$195,445.77	5001	$530,174.30	
Cr. Acct. 5000	718,008.97	5200	7,611.10	
Apprn: Delivery intake to Moccasin	1,660.000 KWH	At	$0,004585	$7,611.10

[256]

San Francisco, July 31, 1937
No. 7-22

Pacific Gas and Electric Co.
San Francisco, California
to Electric Power Bureau, Dr.
Public Utilities Commission
425 Mason Street, Room 610
Telephone PRospect 7000
San Francisco, California.

	Memo Only		
July 1937—Delivered at Newark		40,754,400 KWH	
Losses 24%		9,781,056 "	
			30,973,344 KWH
Revenue at $0.02383		$738,094.79	
Company's Compensation 73.065%		539,288.96	
			$198,805.83

Received Payment
August 11, 1937

Dr. Acct. 3200	$198,805.83	5001	$539,288.96	
Cr. Acct. 5000	733,172.79	5200	4,922.00	
Apprn: Delivery Intake to Moccasin 1,073,500 KWH at			$0.004585	$4,922.00

San Francisco, May 31, 1937
No. 5-21

Pacific Gas and Electric Co.
San Francisco, California
to Electric Power Bureau, Dr.
Public Utilities Commission
425 Mason Street, Room 610
Telephone PRospect 7000
San Francisco, California.

	Memo Only		
May 1937—Delivered at Newark	36,729,600 KWH		
Losses 24%	8,815,104 "		
		27,914,496 KWH	
Revenue at $0.02383	$665,202.44		
Company's Compensation 73.065%	486,030.16		
		$179,172.28	

Received Payment
June 9, 1937.

Dr. Acct. 3200	$179,172.28	5001	$486,030.16
Cr. Acct. 5000	657,655.53	5200	7,546.91

Apprn: Delivery Intake to Moccasin 1,646,000 KWH at $0.004585 $7,546.91"

[257]

(Testimony of Paul J. Ost.)

In connection with said three bills, counsel for the defendant made the following statement:

Mr. Searls: I would like the record to show that these bills are on the stationery of the Electric Power Bureau of the Public Utilities Commission, and they show the month, the year, the number of kilowatt hours delivered at Newark, the line loss of 24 per cent. under the contract is shown between Newark and San Francisco, the resultant number of kilowatt hours reaching San Francisco and revenue at the contract formula 0.2383, and subtracting from that revenue, the company's compensation, 73.065 pursuant to the contract, and the balance paid over to the city monthly.

Q. At the bottom is the note "Delivery Intake to Moccasin", a certain number of kilowatt hours at 0.004585, which represents the delivery of the Intake plant to Moccasin Creek, does it not?

A. Correct. The figure 0.004584 is the statement of the percentage of the net revenue applicable to the energy supplied from the Early Intake. The total revenue derived by the City from delivery of electric energy under the provisions of the contract of July 1, 1925, is approximately $2,200,000 a year.

Thereupon the following occurred:

Mr. Searls: Q. How does the Hetch Hetchy load as delivered under this contract, compare with the total demand in San Francisco?

(Testimony of Paul J. Ost.)

Mr. Hennessy: Objected to upon the ground that it is immaterial, irrelevant, and incompetent.

The Court: For the purpose of the record, what is the purpose of the offer?

Mr. Searls: I wish to show first that the amount of energy which is delivered under this contract is less than the demand in San Francisco, and that if this contract were terminated there would be insufficient energy available for the service of consumers in San Francisco, unless and until the Pacific Gas & Electric Company or some other distributing company should construct new hydro-electric plants and steam plants and standby service. I think that is a very important point from our standpoint to show a public interest in the matter which a court of equity is always entitled to consider in determining whether or not equitable relief will be afforded.

Mr. Hennessy: It is offered on the theory of impossibility of performance of this contract by the city and is covered by your Honor's previous ruling.

Mr. Searls: No, it is not offered on the theory of impossibility of performance but it is offered on the theory that the Court should not award injunctive relief where a great detriment will result to a large number of the public [258] unless no other remedy is available.

(Testimony of Paul J. Ost.)

Mr. Hennessy: That is covered by the ruling your Honor made a few moments ago.

Mr. Searls: I do not think it is. If it is, I would like to have a ruling.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 18.

Thereupon counsel for the defendant made a formal offer of proof as follows:

> I formally offer to prove, through this witness, that if the amount of energy generated and delivered into San Francisco through the medium of this contract, whether it be the identical kilowatts or an equivalent amount, if due to a termination of the contract, were subtracted from the total delivery to San Francisco, it would cause such a shortage in the available power supply of the Northern part of the State of California as would require the construction of additional power plants or additional facilities for bringing power, and would thus endanger the supply for public consumption.

Counsel for the plaintiff objected to the offer of proof so made upon the ground that the matters therein stated were incompetent, irrelevant and immaterial and hypothetical and based upon facts not

(Testimony of Paul J. Ost.)

in evidence in the case. The Court sustained said objection.

Counsel for the defendant duly excepted to the ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 19.

Thereupon the following occurred:

Q. Mr. Ost, has the Moccasin power plant been operated in such a way as to indicate that its performance is responsive to the power demands of San Francisco and consumers?

A. Yes.

Mr. Hennessy: I object to that as immaterial, irrelevant and incompetent. [259]

Mr. Searls: The purpose of this question is to show that the operation of the city's plant is in the nature of a demand by the city to serve its own consumers in San Francisco through the medium of this contract, and not with reference to the needs of the Pacific Gas & Electric Company which the Government apparently is claiming is one of the elements of sale rather than agency.

The Court: I will allow the question to be answered.

A. Yes, the regular operation of the Hetch Hetchy plant indicates that the output of the plant is governed to meet the demands of consumers in San Francisco.

(Testimony of Paul J. Ost.)

(The witness continuing):

The rate of that delivery is controlled by the load factor on the system of the Pacific Gas and Electric Company. The City power enters that system in such a manner as to cause it or an equivalent quantity to flow naturally to San Francisco consumers rather than to any other consumers of the company. This fact is shown by the following:

The hydroelectric plants in California generating power, are, I think, in every instance, in the mountains at some considerable distance from the coast, where the larger cities are, and where the power is consumed. This necessitates the construction of high voltage transmission lines across the State of California. These lines vary in length from 100 to over 250 miles. Naturally, the shorter the line the more reliable it is. The location of San Francisco at the tip of the peninsula makes it difficult to bring hydroelectric power into San Francisco from the company's own plants. The Hetch Hetchy plant is almost directly due east of San Francisco. The transmission line from the Hetch Hetchy plant comes to the lower end of San Francisco Bay in a direct line, where it contacts the far end of this long transmission line of the company. From Newark substation to San Francisco there are six transmission lines. The Hetch Hetchy power comes into those lines at

(Testimony of Paul J. Ost.)

a point where the operating conditions are not conducive to reliability of service or to best operating conditions. With the company's lines they form a very direct and a very reliable circuit from the nearest large generating plant in the State of California, and therefore, with the company having a very large percentage of its load in San Francisco, there is no reason to believe but what the Hetch Hetchy energy finds its most direct outlet into San Francisco rather than back into the company's system through some other transmission line which terminates at Newark.

Q. Does the company take all of the city's power up to the 75 per cent. load factor specified in the contract?

A. It does.

Q. That is, as specified in the contract, a monthly average? [260]

A. I do not think it is specified as a monthly average. It is only specified in the contract that they will take the power on a 75 per cent. load factor and between the operating officials and the company it has been determined that that should be based on a monthly basis; that is, in month terms, rather than daily terms or yearly terms.

Q. What does that mean so far as the actual delivery from the plant is concerned? Do they fluctuate on a larger load factor than that and then on a smaller load factor?

(Testimony of Paul J. Ost.)

A. It means this; that on a Sunday or on a holiday when the load in San Francisco is light, your load factor up at the mountain plant is considerably below 75 per cent., but on the succeeding two days, and days when the demand for power is available the plant delivers up to capacity, so that by the end of each month the energy delivered into the company's system from the Moccasin plant equals 75 per cent. load factor.

(The witness continuing):

At one time in conjunction with the City Engineer I prepared estimates of what it would cost the City to build a distribution, transmission and stand-by system.

Q. What was your estimate of the cost of the city's constructing a transmission, stand-by and distribution system adequate to supply the Hetch Hetchy energy to its people and to furnish the necessary stand-by and supplemental system?

Mr. Hennessy: Objected to on the ground it is immaterial, irrelevant, and incompetent, and the only point in the case is that they have not fulfilled.

The Court: That is not a preliminary question.

Mr. Searls: No.

The Court: The objection will have to be sustained.

(Testimony of Paul J. Ost.)

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 20.

In connection with said ruling, counsel for the defendant thereupon made the following formal offer of proof:

> I offer to prove that it would cost in excess of $60,000,000.00 for the City to build and install its own transmission, step-down, distribution and stand-by service.

Counsel for the plaintiff objected to said offer upon the ground [261] that it called for matters that were incompetent, irrelevant and immaterial, and not within the issues of the case. The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 21.

> Q. What would be the cost of a necessary stand-by system plant for San Francisco if the City were to transmit and distribute only the energy produced at the Moccasin plant without reference to any steam supplemental plant?
>
> Mr. Hennessy: Objected to upon the ground it is immaterial, irrelevant and incompetent, and not within the issues of this case.
>
> The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 22.

(Testimony of Paul J. Ost.)

(The Witness continuing):

I first came to the Engineering Department of the City and County of San Francisco in the Spring of 1909. I was familiar with the plans for the utilization of the Hetch Hetchy power which were in effect prior to the enactment of the Raker Act. I was familiar with the plans which were in effect at the time the Raker Act was enacted.

Q. At what period of time was it definitely determined to pierce the Coast Range Mountains by tunnel and bring the water into the City and County of San Francisco by gravity instead of pumping it over the Coast Range?

Mr. Hennessy: I object to that as immaterial, irrelevant, and incompetent, and not within the issues in this case.

Mr. Searls: The testimony is offered, if your Honor please, for the purpose of showing the change in conditions from the time the grant was originally passed, at which time I intend to show by this witness the plan had been to pump the water over the Coast Range and to use the power for that purpose. Although Engineer Freeman made a study of the Coast Range tunnel prior to the enactment of the Raker Act, it was not actually decided upon until later when they made various core bearings and shafts to prove that it was possible

(Testimony of Paul J. Ost.)

to penetrate that particular formation with tunnels. [262]

The Court: And that was prior to 1925, was it?

Mr. Searls: That was long prior to 1925, but it was subsequent to the enactment of the Raker Act. We want to show that the surplus power available to San Francisco was enormously greater than it was thought at the time the Act was passed.

Mr. Hennessy: It is the same question, your Honor; it simply goes to the same question of convenience, that it was more convenient for San Francisco to change its plan and to sell the power than to conform to the Act. It comes directly within your Honor's previous rulings.

Mr. Searls: It might have had considerable to do with what the intention of Congress was in passing the Act in the first place. Under the authority of these cases I cited from the Supreme Court of California, and from all over the country, testimony showing changes in conditions surrounding the utilization of a grant respecting restrictive covenants is admissible.

The Court: The objection will have to be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 23.

(Testimony of Paul J. Ost.)

Counsel for the defendant thereupon made a formal offer of proof as follows:

I offer to prove by this witness that at the time the Hetch Hetchy grant was enacted, and for many years prior thereto, it had been the plan of the Engineering Department of the City and County of San Francisco to pump Hetch Hetchy water over the Coast Range Mountains and to utilize the greater part of the power which might be developed on that project in so doing. That subsequently to that date—subsequently to the enactment of the Raker Act, some three years afterwards, and not until then, was it determined through the drilling of core holes and the sinking of shafts that it would be physically possible to tunnel that range, the geological conditions being very difficult, and that when that determination was made and the range was tunneled so that the water could come in by gravity from the Moccasin Creek levels, it represented an enormously greater amount of electricity available for disposal by the City than was contemplated at the time the Raker Act was enacted.

The Court: What relation has that state of facts to the issues in this case?

Mr. Searls: First it shows the state of facts which were submitted to Congress at the time of the Raker Act, and will assist the Court in interpreting the language of [263] Section 6 as

(Testimony of Paul J. Ost.)

to the intention of Congress in enacting that language, and, secondly, it shows the change of circumstances which we think should affect the remedy which the Court might impose under the terms of this agreement.

Mr. Hennessy: We object to the offer upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case. The fact that the City of San Francisco changed its plans after the adoption by Congress of the Raker Act is not material at all on the question of whether or not San Francisco, in the sale of power, is violating Section 6 of the Raker Act.

The Court: In what way is that binding on the Government?

Mr. Searls: I do not think it would bind the Government, at all, except that I think it would indicate the intent of Congress if they were dealing with a given state of facts, an estimated quantity of power, and then those facts were changed afterward—it might affect the construction of that Act as well as the remedy. It is offered for both purposes.

Mr. Hennessy: The only way they could do, if they changed the plan, would be they would have to go back to Congress and ask them to change the Act. If this evidence here is offered as an excuse why they are not complying with Section 6 of the Act, why they are selling the

(Testimony of Paul J. Ost.)

power to the Pacific Gas & Electric Company, it is not material.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 24.

Cross-Examination.

Pacific Gas and Electric Company first leased the property of the Sierra and San Francisco Power Company and at a later date acquired it. I am not certain when it first leased the property, but it was possibly in the neighborhood of 1922 or 1923. I do not know. I could not state definitely when it acquired the property, but it was a number of years later.

It was some time late in 1935 that the power developed at the Early Intake plant was first diverted so that it came into the Moccasin Power Plant transmission system. Since that time the power developed at the Early Intake plant has passed into the Pacific Gas and Electric Company trans- [264] mission system at Newark. None of that power is ear-marked when it comes into the Pacific Gas and Electric Company system. The system of the Company supplies San Francisco and the Peninsula and practically all of northern California but its particular substation at Newark does not

(Testimony of Paul J. Ost.)

supply anything but the Peninsula and San Francisco.

It is impossible to state definitely whether the power which the Pacific Gas & Electric Company receives from the Moccasin Power Plant and the Early Intake Power Plant goes to the peninsula cities or goes to San Francisco, but the major part by far of the power which comes into Newark comes into San Francisco. The diversion from Newark, other than to San Francisco, is a very small percentage of the energy which comes into the Newark station. I would say that possibly five to seven per cent of the total energy delivered into Newark is distributed to places other than San Francisco. The amount of energy which comes into that station from other generating plants of the Pacific Gas and Electric Company is considerably larger than the percentage that is distributed in places other than in San Francisco. The Pacific Gas and Electric Company has a number of plants which may be connected with the substation at Newark. It has energy from its Tiger Creek Plant and energy from its plant at Mt. Shasta. The latter connection, however, has only been established in the last few years. It, also, has power plants at Electra and other small plants in the mountains north of the Hetch Hetchy project.

(Testimony of Paul J. Ost.)

Redirect Examination.

Q. Mr. Ost, Mr. Hennessy asked you about the plants from which this energy came. Does some of this energy of the Pacific Gas & Electric Company come from the plants owned by the United States in the Yosemite National Park, do you know?

A. I do not think so, Mr. Searls; because the energy which is sold by the United States Government is sold to the San Joaquin Light & Power Company, which is, now, a subdivision of the Pacific Gas & Electric Company.

(Witness continuing):

The latter energy goes into the San Joaquin territory adjacent to Fresno. The power generated at the Don Pedro Power Plant of the Modesto and Turlock Irrigation Districts by the water released from the Moccasin Plant, also, goes into this system of the Pacific Gas & Electric Company. The water, after it is released from the Modesto Power House, goes into the Don Pedro Reservoir of the Turlock and Modesto Irrigation Districts. They have a generating plant at the Don Pedro plant and the excess power is sold to the San Joaquin Light & Power Company, the same as the Government sells power generated at the Yosemite Plant, to San Joaquin Light & Power Company. [265]

N. RANDALL ELLIS,

a witness for the defendant, being first duly sworn, testified as follows:

I am the Chief valuation and rate engineer for San Francisco, attached to the City Attorney's office. I have held that position since 1913.

At this point, counsel for the plaintiff stipulated that Mr. Ellis had the requisite qualifications as an engineer to testify as an expert.

(The witness continuing):

In the early part of 1925, I was requested by the City officials of San Francisco to make an analysis of the figures on the basis of which the return of .0238 cents in the contract between the City and the Pacific Gas & Electric Company ("U. S. Exhibit No. 6") is based. At the time I prepared a memorandum for the Mayor's Advisory Committee. As shown by said meorandum, the gross revenue for the sales of electric energy made by Pacific Gas & Electric Company in San Francisco during the year 1924, was $8,853,545.00; that was for the combined Pacific Gas & Electric and Sierra and San Francisco Power plant and excluded inter-department sales. The corresponding amount of electric energy sold, excluding inter-department sales, was 371,556,777 kilowatt hours. Inter-department sales are largely sales from

(Testimony of N. Randall Ellis.)

the electrical department of the Company to the Gas Department of the Company, and some small sales to the steam department. In other words, for the purpose of accounting there were certain transfers of the energy from the electric station to the adjacent gas station for the purpose of running meters, etc. It was an inter-company affair which I have excluded, as it would be sold ordinarily at a lower rate than the rate in the schedule.

The combined average per kilowatt hour, therefore, was $8,853,545.00 divided by 371,556,777 which gave an average of .02383 cents per kilowatt hour.

The factor of seventy-six per cent efficiency used in the contract as applied to the average delivery at Newark was obtained in this way: The resultant sales at consumers' meters in terms of energy and estimated transmission and substation efficiency from Newark to the 11 K. W. P. station at Martin substation was estimated at 92.75 per cent. The Martin substation is in the neighborhood of Visitacion Valley just below the County line of San Francisco. It is a large substation stepping down the energy from 110,000 volts A.C. to 11,000 volts A.C.

The estimated distribution efficiency as based upon the experience of the Pacific Gas & Electric Company in San Francisco, from substa-

(Testimony of N. Randall Ellis.)

tion output to its meter was [266] 82 per cent. Therefore, the resultant efficiency between delivery at Newark and consumers' meters was 92.75 multiplied by 82 which gives a resultant of 76 combined efficiency between Newark and the consumers' meters.

The first figure of 92.75% was based on an estimated transmission loss between Newark and the Martin substation plus about 2½ per cent loss in transforming the 110,000 volts to 11,000 volts at the Martin substation. The estimated distribution efficiency between the Martin substation and the consumers' meter was determined in this way: I had all of the data of the operating conditions of the Pacific Gas & Electric Company, with which I had to keep in close touch, on account of handling the rate making. I took the substation output in San Francisco and took also the sales at meters. The resultant showed, at that time, about an 18 per cent loss, which was a combination of loss in the 11,000 volt circuit lines in transformation at the secondary subdivision from 11,000 volts to 2400 volts, the loss between the substation and the pole transformers by which the current is converted from 2400 volts to 110 volts for use in the houses, such losses as might occur in meters, and another loss which was characteristic of a portion of the load at that time, that is the loss resulting from the con-

(Testimony of N. Randall Ellis.)

version of alternating current to direct current for use in industries. The other 18 per cent. was a combination of all intermediate losses between the A.C. terminal at Martin substation and the consumers' meters.

Q. In other words, in your opinion does this 24 per cent. represent the approximate actual loss which a given quantity of energy would suffer if put into the company's system at Newark before it reached the consumers' meters at San Francisco?

A. It did at that time.

Mr. Searls: Q. Now, will you continue with your explanation of the balance of the figures, of the 73 per cent.?

A. I can probably explain it better by reading a short report that I made to the Mayor's Committee at that time, to James Rolph, Jr., Ralph McLeran, and Warren Shannon, who were a committee of the Board of Supervisors on Hetch Hetchy Power.

"Gentlemen:

In compliance with your request, I would respectfully submit the following estimate of probable costs to the Pacific Gas and Electric Company, to deliver Hetch Hetchy power from Newark to consumers' meters.

I have expressed this in percentages of gross revenue received from consumers, taking gross revenue as 100%."

(Testimony of N. Randall Ellis.)

I am reading a copy of a report that I made. I am just coming to the figures you requested. [267]

Q. In your opinion is that correct?

A. That report was correct at that time, in my judgment.

The Court: Proceed.

A. "A. General Administration Expense — General Capital charges, Taxes, Fire, Casualty and Uncollectible Reserves 17.5%

B. Distribution Costs from high tension side of Martin Substation to consumers' meters, including return on capital, depreciation, operating and maintenance expense 35.3%

C. Steam Standby and Peak Load Expense, including return on capital, depreciation, operating and maintenance expense 18.0%

D. Transmission Expense, Newark to Martin substation 2.5%

73.3%"

Q. In your opinion at that time did that figure represent the actual expense of the Pacific Gas & Electric Company in distributing

(Testimony of N. Randall Ellis.)

electrical energy received by it at Newark to consumers in San Francisco, including a reasonable return on the capital required for that purpose?

A. Yes.

Mr. Hennessy: We object to that on the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The Court's opinion is that what he read does not enter into the merits of this case. However, I departed so that I might be informed as to the figures. The objection is sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 25.

Thereupon the following occurred:

Mr. Holm: I assume the Court will take judicial notice of the opinions of the California Railroad Commission. I wish to call your Honor's attention to Decision 21,247, "In the Matter of the Application of the City and County of San Francisco, a Municipal Corporation, that the Railroad Commission of the State of California fix and determine the just compensation to be paid by the City and County of San Francisco".

Mr. Hennessy: The Court does not take judicial notice of the Railroad Commission's decisions.

(Testimony of N. Randall Ellis.)

Mr. Holm: If it does not we will ask that it do [268] take judicial notice of the decision that I have referred to, in response to Application No. 9767, that the Railroad Commission of the State of California fix and determine the just compensation to be paid by the City and County of San Francisco for certain parts and portions of the electric generating, transmission and distribution properties of the Great Western Power Company of California, a corporation. I ask that that decision, without burdening the record at this time in reading it, be accepted as evidence. The purpose of the offer is this, that in the rate proceedings of the Great Western Power Company which were instituted on February 11, 1924, the value of these properties was fixed by the Commission in the sum of $11,815,000. Now, we have submitted and made an offer that in the year 1930 a bond issue was submitted to the people of San Francisco to purchase the Great Western Power Company in the amount of $18,945,000. There is an apparent discrepancy between the $11,815,000, as fixed by the Railroad Commission, and the amount of the proposed bond issue, and through this witness I wish to establish wherein the discrepancy arose.

Mr. Hennessy: I do not think the evidence is admissible under any theory. We are not concerned here with any discrepancy as was

(Testimony of N. Randall Ellis.)

stated by counsel. It is absolutely immaterial, irrelevant, and incompetent and not within the issues of this case.

Mr. Holm: If your Honor please, we think it is competent, relevant, and quite material to the issues in this case. We wish to establish to this court of equity and have firmly fixed in the record of this case that the City and County of San Francisco officially did everything within its power to fulfill the terms of the Raker Act, and specifically the provision that was called to your Honor's attention in this case.

The Court: Is the matter submitted?

Mr. Holm: Yes.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated Ruling and Exception No. 26.

Counsel for the defendant thereupon made a formal offer of proof respecting the subject matter of the foregoing ruling as follows:

Mr. Holm: I offer Decision No. 21,248 of the Railroad Commission In the Matter of the Application of the City and County of San Francisco, a Municipal Corporation, that the Railroad Commission of the State of California fix and determine the just compensation to be paid by the City and County of San Fran-

(Testimony of N. Randall Ellis.)

cisco for certain parts and portions of the electric generating, trans- [269] mission and distribution properties of the Pacific Gas and Electric Company, a corporation; said decision and the one previously referred to are found in Volume 33 of Opinions and Orders of the Railroad Commission of California. The last decision referred to fixes the valuation of the properties of the Pacific Gas & Electric Company as of June 1929 in the sum of $26,880.00. The exhibit that we have heretofore offered shows that on August 26, 1930, a bond issue was submitted to the people of the City and County of San Francisco for the purpose of acquiring certain properties of the Pacific Gas & Electric Company in the amount of $44,600,000, and we desire to show to the Court wherein the difference in the valuation fixed by the Railroad Commission of the property of the Pacific Gas & Electric Company sought to be taken in this proceeding and the bond issue in the amount that I have specified—we want to show wherein that difference arose.

Counsel for the defendant objected to said offer upon the ground that it was immaterial, irrelevant, and incompetent, and not within the issues of this case, and in connection therewith stated that the Court had previously ruled that the evidence with reference to the bond issues was not admissible. The Court sustained said objection.

(Testimony of N. Randall Ellis.)

Counsel for the defendant objected to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 27.

As hereinbefore stated, said Decisions 21247 and 21248, rendered by the Railroad Commission of California, pursuant to the aforesaid Applications, respectively, are reported in Volume 33 of Opinions and Orders of the Railroad Commission of California, at pages 202 and 219, respectively.

Thereupon the following occurred:

Mr. Searls: Your Honor, I won't take the time of the Court in calling a witness on this, but I desire to offer in evidence through Mr. William Nanry, who was called as a witness yesterday, a statement of the bonds which have been authorized and sold by the City and County of San Francisco for governmental purposes between 1924-5 and 1937, for the purpose of showing the changes in the city's bonding capacity which have resulted thereby and the legal impossibility of the city voting bonds sufficient to cover the cost of a municipally-owned distribution system. [270]

In connection with said offer counsel for the plaintiff stipulated that the witness, if called, would testify that the figures stated in the statement were correct, but objected to the offer of the statement as follows:

Mr. Hennessy: We object to it on the ground it is immaterial, irrelevant, and incom

(Testimony of N. Randall Ellis.)

petent, and, as stated by counsel this morning, the financial inability of San Francisco to comply with the provisions of the Raker Act is no justification for the sale of power contrary to the terms of Section 6 of the Raker Act.

Mr. Searls: My thought of this is not financial, but with respect to the law.

The Court sustained said objection. Counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 28.

Said statement was thereupon marked for identification as

"DEFENDANT'S EXHIBIT NO. O for Identification"; it reads as follows:

"(October 1937)

Table A.

(a)	Assessment Roll	Debt Limitation	Bonded Debt Subject to Limitation	Leeway for New Debt	Non-Limit Debt, Charge on Taxpayers
1924-25	$684,099,920	102,614,988	89,823,400	12,791,588	
1927	Bonds Authorized	Memorial Hall	(6-14)	4,000,000	
		*Bernal Cut	"	1,400,000	
		*Boulevard	(11-8)	9,380,000	
1928		*Hetch Hetchy	(5-1-28)		24,000,000
1929		*Hospital	(11-6-28)	3,500,000	
		*Sewer	(11-6-28)	2,200,000	
		sub-total		20,480,000	24,000,000

(Testimony of N. Randall Ellis.)

	Assessment Roll	Debt Limitation	Bonded Debt Subject to Limitation	Leeway for New Debt	Non-Limit Debt, Charge on Taxpayer
(b)					
1929-30	1,196,439,062	143,572,687	53,009,400	90,563,287	
1931	Bonds Authorized		sub-total above	20,480,000	24,000,000
			County Jail (11-4-30)	850,000	
			*Unemployment, Park Playground, Streets	2,500,000	
1932			Relief (8-30-32)	6,500,000	
			Hetch Hetchy (5-3-32)		6,500,000
1933			*Sewers (11-7-33)	2,625,000	
			*High Pressure	2,000,000	
			*Airport	260,000	
			*School (12-19-33)	3,000,000	
				38,215,000	30,500,000

[271]

(c)					
1937-38	991,119,933	118,934,392	48,706,600	70,227,792	
1937	Bond Issue Propositions on Nov. 2, 1937 ballot		Cahill-Ridgway. Street Car Rapid Transit Subway Plan	49,250,000	
			Sewer Improvement	5,000,000	
			Airport Development	2,850,000	
			Health Department Building Improvements	1,600,000	
				58,700,000	

*Details of these bond issues outlined in Table B''

Thereupon the following occurred:

Mr. Searls: I also offer to prove by said witness that during the period from 1929 to 1937 particularly, due to the advent of the recent depression, the burden cast upon the bonded leeway of San Francisco through the operation of the bond debt limitation law has been greatly increased, and the leeway diminished because of the necessity of providing a large sum of money for relief and large sums of money for sewers, schools, streets, and other expenditures which in normal times would be taken care of through the annual tax levy, but by reason of this severe depression having been forced to be capitalized in order to make possible the rendition of this service to the people of San Francisco.

Counsel for the plaintiff objected to said offer upon the grounds that the matters embraced therein were incompetent, irrelevant and immaterial and not within the issues of the case. The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 29.

Mr. O'Toole: At this time, if your Honor please, we desire to offer a certified copy of the Water Appropriations made by San Francisco and by other persons on behalf of San Francisco, and by others whose rights are as-

(Testimony of N. Randall Ellis.)

signed to San Francisco, showing the various water rights which San Francisco has acquired on the Tuolumne River, Lake Eleanor, Cherry River, and tributaries of both rivers and the lake, for the purpose of showing that the water rights which [272] are used in the development of the power which is the subject of this action are owned by the City of San Francisco under and by virtue of the laws of the State of California and pursuant to no grant from the federal government. I understand that the United States Attorney, while he objects to the materiality of the evidence, will not object to the form in which it is presented, your Honor.

Mr. Henriessy: That is true. But we object to the evidence upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case. We are not concerned with who owns the water.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 30.

Counsel for the defendant then made a formal offer of proof as follows:

Mr. O'Toole: I now offer a record of the water rights of the City and County of San Francisco on the Hetch Hetchy project, showing that water owned by virtue of the city's

(Testimony of N. Randall Ellis.)

rights is used for the development of the Hetch Hetchy electric power which is being distributed by the Pacific Gas & Electric Company under and pursuant to the provisions of the contract which is the subject-matter of the action, and offer to prove that the city is the owner of those rights, and, as I said, they constitute the rights whereby the City of San Francisco makes use of the water on the Hetch Hetchy project.

Counsel for the plaintiff objected to said offer on the grounds that the matters embraced therein were immaterial, irrelevant and incompetent, and not within the issues of the case, and that the ownership or non-ownership of these water rights by the City of San Francisco was not involved in any way in the case.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 31.

Thereupon, said record of water appropriations was marked "Defendant's Exhibit P for Identification".

The record of the water appropriations contained in said "Defendant's Exhibit P for Identification" shows 56 separate appropriations of water [273] rights and appurtenant easements made by James D. Phelan, William Ham Hall, Marsden Manson, Sierra Ditch & Water Company, Thomas R. Hanna,

(Testimony of N. Randall Ellis.)

and the City and County of San Francisco in respect of the waters and bed of Eleanor Creek, Tuolumne River, Cherry River, Frog Creek and other streams in Tuolumne County, California, and elsewhere, in the State of California. The first of said appropriations was made on July 29, 1901, and the last of them was made on August 15, 1911. Said record of appropriations, exclusive of the index page preceding the same and the certificate page following the same, comprises 109 pages. Because of its character and size it is impracticable to incorporate said original Exhibit herein, but it will be transmitted to the United States Circuit Court of Appeals as part of the defendant's record on appeal herein for use upon said appeal.

Thereupon the following occurred:

Mr. O'Toole: At this time I also offer, if your Honor please, a record of the assignments made by the various appropriators of the water rights which are mentioned in "Defendant's Exhibit P", said assignments running from said appropriators to the City of San Francisco.

Mr. Hennessy: We make the same objection to that as immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The same ruling.

Counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 32.

(Testimony of N. Randall Ellis.)

The record of the assignments of said water rights covered by the said ruling were thereupon marked for identification as "Defendant's Exhibit Q for Identification".

Said record of assignments included within "Defendant's Exhibit Q for Identification", comprises eight separate assignments, (some of them mediate and some of them intermediate), from William Ham Hall, Thomas [274] R. Hanna, Sierra Water & Ditch Company, Tuolumne Water Supply Company, James D. Phelan and Marsden Manson to the City and County of San Francisco, of the appropriation rights of the assignors in respect of water and appurtenant rights on streams in Tuolumne County, California, and elsewhere in the State of California, as well as certain appropriations of water rights and appurtenant rights. Said record, exclusive of the index page, comprises forty-four pages, and, because of its character and size, it is impracticable to incorporate it herein. Said original exhibit, however, will be transmitted to the United States Circuit Court of Appeals as part of the defendant's record on appeal herein for use upon said appeal.

In connection with the offers of the documents, marked for identification as "Defendants Exhibit O to Q", inclusive, as aforesaid, the following occurred:

Mr. Searls: Mr. Hennessy, I do not want the question of technical procedure to arise

(Testimony of N. Randall Ellis.)

here as to the offers, that we did not actually have a witness on the stand at the time I made my previous offers and Mr. O'Toole made his. Will there be any point made by the Government on that?

Mr. Hennessy: No, we make no point on that.

Thereupon the following occurred:

Mr. O'Toole: The defendant rests.

Mr. Hennessy: The Government rests.

Mr. Licking: If your Honor please, at this stage of the proceedings I wish to address a motion to strike certain of the evidence beginning with the evidence of the witness Joseph J. Phillips, given on October 20, and more particularly that part of the evidence of the witness Philips where he testified to the value of certain lands given by the Government under the terms of this Act to the defendant, and where he also testified as to the value of certain lands returned by the defendant to the Government. I submit it upon the objections previously stated.

The Court: Is it the subject of a motion to strike.

Mr. Licking: Yes. [275]

Mr. O'Toole: As the motion which counsel is making, that is, his motion to strike, goes to

the very merits of this case, I respectfully ask your Honor that when the Government has made its motion to strike your Honor reserve the ruling until at least the matter has been argued and briefs are in.

The Court: There is no objection to that, I take it?

Mr. Hennessy: No.

Mr. Licking: There is no objection to that except the points have been argued and are before the court now.

The Court: I know, but if they wish to argue them further I am willing to give them the time. Let the record remain and you can renew your motion at the proper time.

Mr. Licking: I am making it at this time merely referring to the names of the particular witnesses and generally indicating the evidence, and in the memorandum submitted to the Court the evidence will be singled out and definitely specified. I might say at this time that I will simply make a general designation of the testimony as given by the witness, and will specifically designate it in the memorandum given to the Court.

Mr. O'Toole: That is entirely all right.

Mr. Licking: All of the evidence given by the witness Joseph J. Phillips as to comparative costs and values.

The same motion will be directed to the testimony of the witness Hansen given when re-

called to the stand on October 20, with respect to the cost of certain road work, certain trails, certain expenses for grading and construction, certain expenses on roadways, certain expenses for annual payments, and all of the evidence that was given by this witness as to comparative costs and values, and all his estimates concerning engineering costs along that line.

At the same time we will move that there be stricken from the records of the court a certain letter from the Secretary of the Interior to the City dated May 18, 1928, which is Defendant's Exhibit C.

We also move that the testimony of the witness W. H. Nanry, as to certain estimates made by this witness, as to an assumed increase in tax rates payable by the voters of the voters of the City and County of San Francisco, and all of the testimony by said witness as to the comparative cost estimates and estimated increase in tax rates, be stricken from the record upon the grounds previously stated, that the same is immaterial, irrelevant, and incompetent, and that it is not within the issues of this case.

We address the same motion to the testimony of the witness Ellis, the Chief Engineer of San Francisco, and particularly to that portion of his evidence wherein he testified [276] as to certain figures stated in the contract as the basis of the rate of compensation paid to

the city and his testimony as to the method or methods whereby these figures were arrived at, that it be stricken from the record on the ground that the same is immaterial, irrelevant, and incompetent, and concerns no issue in the case.

Also in connection with the testimony of the witness Willis O'Brien, there was admitted in evidence a certain document dated July 1, 1925, (Defendant's Exhibit F in evidence), which purports to relate to an estimate of bond issues, bonded indebtedness and other matters concerning tax rates, etc., on the ground it is immaterial, irrelevant and incompetent, and concerns no issue in this case.

With reference to the motion in connection with the testimony of R. B. Hansen, I move also to strike the testimony given by him as to the rental value. All of these matters are based on the ground that all of the evidence referred to, and each of the exhibits referred to, and each and every part of the evidence referred to and each and all of the exhibits are immaterial, irrelevant, and incompetent, and that none or any of them have any bearing on the real issues in this case.

Mr. Searls: We resist the motion with the understanding, of course, we will reply to the motions at the time we argue the merits of the case. Is that satisfactory to counsel for the Government?

Mr. Hennessy: Yes.

Mr. Searls: Also for the record, Defendant desires to move for a judgment of dismissal. I suggest that the Court reserve a ruling on the motions to strike until he reads the briefs, and decide the motions at the same time as he decides the case.

The foregoing is all of the evidence offered or received and proceedings had upon the hearing of said cause, except as next stated.

Subsequent to the conclusion of said hearing and before the final argument of said cause, counsel for the Government, pursuant to leave asked and granted at said hearing, as aforesaid, formally specified the evidence with respect to which it urged its motion to strike out, and at the same time formally withdrew the motion of the plaintiff, made at said hearing, to strike out portions of the testimony of the witness H. Randall Ellis. The evidence with respect to which said motion to strike was urged was the following: [277]

1. All testimony given by the witness, Joseph James Phillips, as hereinbefore set forth, with respect to the value of lands acquired by the defendant from the United States under the Raker Act;

2. All testimony given by the witness, Joseph James Phillips, as hereinbefore set forth, to prove that no water rights were acquired by the defendant from the United States;

3. All testimony given by the witness, Joseph James Phillips, as hereinbefore set forth, as to the cost to the defendant or the value of the lands and water rights acquired by the defendant from sources other than the United States;

4. All testimony given by the witness, Joseph James Phillips, and the witness, R. B. Hansen, hereinbefore set forth with respect to the value of the lands given to the United States by the defendant;

5. All testimony of the witness, R. B. Hansen, as hereinbefore set forth, with respect to the cost (including overhead cost) to the defendant of roads and trails in Yosemite National Park, and of the sum of money paid by the defendant to the United States for the construction of roads and trails in said park;

6. Defendant's "Exhibit C" (being the letter dated May 18, 1928, from Secretary of the Interior Work dealing with the defendant's obligation under the Raker Act to construct or otherwise provide roads and trails);

7. All testimony given by the witness, R. B. Hansen, as hereinbefore set forth, with respect to rentals paid by the defendant to the United States, as prescribed in the Raker Act;

8. All testimony given by the witness, Willis O'Brien, as hereinbefore set out, with respect to the bond issues authorized and bonds sold by the defendant to finance the Hetch Hetchy project, and

the amount of interest paid or accrued on sa bonds; [278]

9. All testimony given by the witness, Will O'Brien, as hereinbefore set out, with respect t the available bonding capacity of the defendan within its legal debt limit, in 1925.

10. Defendant's "Exhibit F" (being the doc ment entitled "Bonded Debt Limit" and containin statements of the bond issues available, bondi capacities, etc.)

11. All testimony given by the witness, Wi liam H. Nanry, as hereinbefore set forth, with r spect to the increase in the defendant's tax ra which would be necessary if the defendant lost th revenue now received by it under the contract July 1, 1925, between it and Pacific Gas and Ele tric Company.

Thereafter, said motion to strike was argued an submitted for decision. On April 11th, 1938, th Court made an order by which it granted, in ful said motion of the plaintiff to strike out portion of the evidence in the case. The portions of th evidence so stricken out by said Order were th following:

(a) The following testimony of Joseph Jame Phillips, a witness for the defendant:

Q. What was the value of those parce [referring to the parcels of land conveyed b the United States to the defendant pursua to the terms of the Raker Act.]

A. $244,139.45.

Q. Do you know the total acreage and the value [of the lands conveyed by the defendant to the United States]?

A. The acreage was 1698.36 and the value $74,409.00.

Q. As purchasing agent for the project, and acquiring it, did you acquire any water rights from the United States Government?

A. No.

Q. Are you familiar with the so-called Ham Hall purchase made by the City and County of San Francisco?

A. Yes.

Q. How was it made?

A. $1,052,000. [279]

Q. That includes the water rights and the lands, does it, Mr. Phillips?

A. Water rights and lands and development work, buildings, and various other items.

Q. Where is it located, for the information of the Court?

A. Cherry and Lake Eleanor.

Q. Indicate it on Exhibit A for the information of his Honor.

A. There are three watersheds involved in the Hetch Hetchy project. One is named Hetch Hetchy Valley, and the other two in the watershed are Lake Eleanor and the watershed of Cherry River. Ham Hall purchased the land, buildings, development work, surveying and

other work in these watersheds of Lake Eleanor and Cherry.

Q. Have you stated all the value of the lands that were obtained from the Government on this project?

A. Yes.

Q. Repeat them, please.

A. $244,139.45.

Q. Have you the figures of what it cost the City and County of San Francisco to purchase the area that is indicated in red at the Moccasin Power Plant on Defendant's Exhibit A?

A. I have not the itemized figures here of the various properties. What I have is my valuation of real property owned by the City and County of San Francisco which under the charter it is my duty to prepare every year.

Q. You mean in connection with this project?

A. All properties owned by the City, and in this book is everything in connection with the Hetch Hetchy project.

Q. Would you kindly relate what the properties are that are used in connection with the Hetch Hetchy project, and their value?

A. I have before me a report showing—do you want the property as well as the price?

Q. Yes, I certainly do.

A. Tuolumne County there is a reservoir land; rights of way, reservoir land, aqueduct, power plant, regulating reservoir, rights of

way, electric transmission lines and rights of way, Hetch Hetchy railroad land and rights of way. In further toward the city I have railroad land, aqueduct and electric transmission line, with a total of $2,372,514. Those are the actual figures taken from the deeds.

Q. That likewise, is the amount of money that the City and County of San Francisco paid for aqueduct, tun- [280] nels rights of way parcels of land that were required to be acquired in fee, and, in short, the entire value of the real property involved or the easements in the Hetch Hetchy project?

A. Yes.

(b) The following testimony of R. B. Hansen, a witness for the defendant:

Q. Referring to Section 9(p) of the Raker Act, that the grantee shall construct a trail on the north side of the Hetch Hetchy reservoir site, and leading from said trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow, do you know the amount of money that the City and County of San Francisco expended, if any, in the carrying out of the obligations under that section of the Act?

A. I have taken from our office records the actual cost to the city of those trails as $82,670.04.

Q. In addition to that, in lieu of the building of the trails on the north side of the valley,

and constructing the road from Hetch Hetchy to all those valleys were certain amounts paid to the United States Government and accepted by the Secretary of the Interior in or about the year 1930?

A. They were. There were five payments made by the City and County of San Francisco to the United States Government, a payment of $250,000 in each of the five years, 1932 to 1936, inclusive. This gives a total of $1,250,000.

Q. The program to which you have testified which cost $1,250,000 was the program which was subsequently approved by the Board of Supervisors and followed out, was it not?

A. Yes.

Q. Now, in addition to this expenditure, did the city expend any money in the grading and construction of the present highway leading from Mather in to the Hetch Hetchy Valley, a distance of 19 miles, I think?

A. The city paid for the entire cost of this road, the total cost to the city being $353,500.91.

Q. Has that road been conveyed to the United States Government?

A. Yes, it is being used by the public.

Q. Did the City construct a road, a wagon road, from Hetch Hetchy Lake to Lake Eleanor?

A. The City constructed a wagon road leading from Hetch Hetchy Reservoir to Lake Eleanor, at the cost of about $75,000.

Q. Is that road available for public use under [281] safety restrictions?

A. Yes.

Q. Did the City also reimburse the Tuolumne Water Supply Company for sums expended by that company from 1902 to 1911 in constructing roads and trails to the Stanislaus National Forest which have later been made available to the Government and the public?

A. The City reimbursed the Tuolumne Water Supply Company to the extent of $85,000, covering work on roads and trails that had already been done by this company during the period from 1902 to 1911.

Q. What was the total of the figures which you have given as to the roads and trails constructed by the City and County of San Francisco in the National Park, or for which money was furnished either to the Government or to its predecessor in interest when the trails were later turned over to the Government?

A. This total expenditure adds up to be $1,846,170.95.

Q. Under the provisions of Section 9 (t) of the Raker Act, the grantee is required to convey to the United States a good and sufficient title to any and all tracts of land which are now owned and not actually required for use under the provisions of this Act. Did the

City expend any money in order to comply with the terms of that provision of the Act?

A. The city returned to the Government 1698.36 acres which they had bought from private parties previously.

Q. Have you the values at which these lands have been appraised, or are they combined with the purchase of water rights and other things?

A. We have appraised those at approximately $100 an acre, which gives an appraised value of $169,836.

Q. Under the terms of Section 7 of the Raker Act the City and County of San Francisco is required to pay annually to the United States sums commencing with $15,000 and at the end of ten years running up to $30,000. Have those payments been regularly made by the City?

A. They have been regularly made by the city to the United States Government.

Q. And accepted by the United States Government?

A. Yes.

Q. Those sums are remitted to the Secretary of the Interior, are they not?

A. Yes.

Q. What is the total of those sums to date including the year 1937?

A. The total including the year 1937 is $330,000. [282]

Q. Have you apportioned the proper overhead expense of engineering and administration relating to the maintenance of trails and roads, not included in the above estimate? I am referring now only to roads and trails which are conveyed to the Government or made subject to the Government's use.

A. Yes. The cost of engineering and administration and overhead expense and maintenance of roads and trails has been estimated at 10 per cent.

Q. If you add those last figures to your total paid originally for the roads and trails you get a grand total of $2,702,607, do you not?

A. Yes, that is correct.

(c) A letter dated May 18, 1928, from Hubert Work, Secretary of the Interior, to the City and County of San Francisco, previously admitted in evidence and marked "Defendant's Exhibit C".

(d) The following testimony of Willis O'Brien, a witness for the defendant:

Q. What was the total amount of the bond issue voted for this project?

A. $89,600,000.

Q. In the exhibit referred to (i. e., "Defendant's Exhibit F") it is set out year by year as to when the bonds were voted, the rates of interest, and what else does it show, briefly?

A. As to the years that they were voted, that is not shown, but the date of the bonds

are shown, for example, the bonds of the 1909 issue, January 1, 1910 issued July 1. The elections authorizing these, of course, were held some time before.

Q. It also shows, does it, what the bonded debt limit of San Francisco was on July 1, 1925?

A. It does.

Q. What is that, in your Exhibit?

A. The limit for future issues after sale of all currently authorized bonds was $12,732,588.

Q. Directing your attention to the last page of this exhibit, just explain to his Honor what that page purports to show. [283]

A. You have reference to the bond interest?

Q. Yes.

A. That schedule shows the total bond interest to June 30, 1937 with the detail there as to the issues.

Q. What is the total interest that has been paid?

A. The grand total of interest is $41,021,874.01.

(e) A three-page document dated July 1, 1925, entitled "Bonded Debt Limit", prepared by the witness Willis O'Brien, and countersigned by Harold J. Boyd, Controller of the City and County of San Francisco, showing the Bonded Debt Limit of said City and County; this document had previously been admitted in evidence and marked "Defendant's Exhibit F".

(f) The following testimony of William H. Nanry, a witness for the defendant:

Q. Mr. Nanry, assuming that the income from the hydro-electric energy marketed through the contract in question has averaged something in excess of $2,200,000 annually per year, can you state what the net effect upon the taxpayers of San Francisco would be if there was a cancellation of this contract and that income were cut off?

A. If that income would not be available from the agency agreement it would have to be made up by taxation and would require an increase of about 28 cents in the tax rate.

Q. 25 cents per hundred dollars?

A. Per hundred dollars of assessed valuation.

Q. Is that statement based upon the present assessment roll of San Francisco?

A. Current assessment roll of the city.

Counsel for the defendant duly excepted to said ruling of the Court striking out the portions of the evidence above set forth. Said ruling and exception are here designated as Ruling and Exception No. 38.

During the course of the hearing of said cause and prior to the conclusion of said hearing, counsel for the defendant moved the Court to reopen said cause and to receive the evidence theretofore offered by the defendant upon the hearing of said

cause, and to which the Court had theretofore sustained objections of counsel for the plaintiff, as herein- [284] before shown.

On April 11, 1938, the Court made an order by which it denied said last mentioned motion. Counsel for the defendant duly excepted to the ruling embodied in said last mentioned order. Said ruling and exception are here designated as Ruling and Exception No. 34.

During the course of the hearing of said cause and prior to the conclusion thereof, counsel for the defendant moved the Court to require the plaintiff to specify seriatim and severally (a) the provisions in the contract of July 1, 1925, made by The City and County of San Francisco with the Pacific Gas and Electric Company for the distribution of municipal electric energy ("Exhibit A" to the Answer of the Defendant filed herein July 20, 1937, and United States "Exhibit No. 6" at the Final Hearing), upon which the Plaintiff relies to establish that said contract is not an agency contract, but a contract of sale, and to specify (b) which of those provisions the Plaintiff claims (1) show or tend to show that the parties to said contract did not intend to make an agency contract but a contract of sale, or (2) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties), (a) are legally inconsistent with the idea of an agency; (b) make it impossible, as matter of

law, for the contract to be one of agency, and/or (c) convert, by operation of law, what was or may have been intended as one of agency into a contract of sale.

The Court failed and refused to grant said motion and failed and refused to direct counsel for the plaintiff to make the specifications therein mentioned, and counsel for the defendant duly excepted to said ruling of the Court failing and refusing to grant said motion, and failing and refusing to direct counsel for the plaintiff to make the specifications therein mentioned. Said ruling and exception are here designated as Ruling and Exception No. 35.

[285]

During the course of the hearing of said cause and prior to the conclusion thereof, counsel for the defendant also moved the Court that in the decision of said cause it deal, specifically, with each of the said contentions if and as made by the plaintiff aforesaid, and declare which of the said contentions, in the judgment of the Court, are sound and which are unsound; and in and by its said decisions, and in advance of any findings of fact to be made herein, furthermore and independently of said contentions specify (a) severally the provisions in the aforesaid contract, if any there be, which, in the opinion of the Court, (1) establish or tend to establish that said contract is not an agency contract, but a contract of sale, (b) show or tend to show that the parties to the contract did not intend to make any agency contract, but

a contract of sale, (c) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties) (1) are legally inconsistent with the idea of an agency; (2) make it impossible, as a matter of law, for the contract to be one of agency and/or (3) convert, by operation of law, what was or may have been intended as one of agency into a contract of sale.

The Court failed and refused to grant said last mentioned motion of the defendant and failed and refused to specify its decision in matters mentioned in said motion. Counsel for the defendant duly excepted to said ruling of the Court failing and refusing to grant said motion and failing and refusing to specify in its decision the matters mentioned in said motion. Said ruling and exception are here designated as Ruling and Exception No. 36.

In connection with the foregoing motions which are the subject matter of Rulings and Exceptions Numbers 35 and 36 aforesaid, the defendant stated to the Court that it made said motions and each of them so that if after learning the views of the Plaintiff and the Court, there [286] were any provisions of the agreement of July 1, 1925 in respect whereof the defendant might wish to seek or negotiate amendment thereof, to meet and overcome said views of Plaintiff and/or the Court, it (the Defendant) might have seasonable opportunity so to do.

[287]

Pages 150-152 (inclusive) deleted. [288]

On April 11, 1938, the Court rendered and filed a written opinion in said cause (later reported in 23 F. Supp. 40). Said opinion is not incorporated herein because it appears elsewhere in the record. Counsel for the defendant duly excepted to certain of the so-called findings of fact and conclusions of law contained in said Opinion. Said exceptions are hereinafter noted in connection with the exceptions to the findings of fact and conclusions of law, contained in the "Findings of Fact and Conclusions of Law", made and signed by the Court and filed herein, on June 24th, 1938, as hereinafter stated.

On April 15, 1938, the attorneys for the plaintiff, in accordance with Rule 42 of the above entitled Court, served upon the attorneys for the defendant, and lodged with the Clerk of the Court proposed "Findings of Fact and Conclusions of Law". Thereafter, on April 23rd, 1938, the defendant in accordance with said Rule 42, duly served upon counsel for the plaintiff and lodged with the Clerk of said Court, proposed amendments to said Findings of Fact and Conclusions of Law so proposed by the attorneys for the plaintiff. Said proposed "Findings of Fact and Conclusions of Law" so served and lodged on April 15, 1938, and said proposed Amendments thereto so served and lodged on April 23, 1938, as aforesaid, are not herein set forth for the reason that they were thereafter superseded and withdrawn as hereinafter stated.

On May 19, 1938, the attorneys for the plaintiff, in lieu and stead of the Findings of Fact and Conclusions of Law theretofore proposed by them and served and lodged on April 15, 1938, as aforesaid, filed, served and lodged proposed "Findings of Fact and Conclusions of Law" in said cause, which read as follows: [289]

[Title of Court and Cause.]

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause came on regularly for trial in the above entitled court, Honorable Michael J. Roche, Judge of said court presiding, on October 19, 1937, the plaintiff United States of America being represented by its attorneys Frank J. Hennessy, United States Attorney for the Northern District of California, W. E. Licking, Assistant United States Attorney, and Frederic L. Kirgis; the defendant City and County of San Francisco being represented by John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Robert M. Searles; whereupon evidence both oral and documentary on behalf of the parties was offered and received and the cause regularly continued to October 21, 1937, at which time leave was granted the parties to file briefs, and said briefs having been filed and the matter argued orally by the parties on March twenty-

first and twenty-second, 1938, and the case having been submitted to the court for its decision on the latter date; the court having duly considered the evidence and the briefs and arguments of counsel and having on April 11th, 1938, rendered its decision herein in favor of plaintiff together with its written opinion in support thereof, and being fully advised in the premises, now makes the following special findings of fact and reaches the following conclusions of law:

Findings of Fact.

I.

The defendant City and County of San Francisco, hereinafter referred to as the City, is a municipal corporation of the State of California. The Pacific Gas & Electric Company, hereinafter referred to as the Company, is a private California corporation, engaged in the business of distribution and sale of electric energy in the City and County of San Francisco and elsewhere.

II.

For a number of years prior to December 19, 1913, the City had been seeking to assure itself of adequate water and low rate electricity by a plan known as the Hetch Hetchy project. By the terms of the Raker Act of December 19, 1913 (38 Stat. 242) the United States, acting through the Congress granted to the City lands and certain rights and privileges in its lands;

among the rights and privileges so granted was the right to utilize the granted lands and their appurtenant resources for the development of electric energy, including the storage and transmission of water necessary for the generation of electric energy and the transmission of electricity generated.

The grant so made by the United States was conditional upon the acceptance by the City of the terms and conditions therein specified. [290]

III.

Thereafter, the City of San Francisco, through an ordinance passed by its Board of Supervisors and approved by its Mayor, January 13, 1914, did accept said grants contained in the Raker Act and acquiesced in and became bound by the terms and conditions thereof.

IV.

To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant, it was provided in the Raker Act:

> 'Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it by the said grantee.'

V.

Prior to July 1, 1925 the City had entered into the use and enjoyment of the lands, rights and privileges granted by the Raker Act and was then, and is now, generating and transmitting electric energy through its utilization thereof.

VI.

The lands and rights acquired by the City from the United States are indispensable to the operation of the City's Hetch Hetchy project, although it includes lands and rights other than those acquired from the United States under the Raker Act.

VII.

On July 1, 1925 the City entered into a contract with the Company for the distribution and sale of electric energy generated by the City at its Moccasin Creek Power Plant, part of the so-called Hetch Hetchy project. A true and correct copy of the contract is filed with the City's answer, marked 'Exhibit A' thereof, and is made a part of this finding by reference.

VIII.

Since July 1, 1925, electric energy originating at the Moccasin Creek Power Plant of the City, and since late in 1935, the electric energy originating at the City's Early Intake plant, all generated and transmitted through utilization of the lands, rights and privileges granted

to the City by the United States, has been, and is now being delivered to the Company under the terms of the contract executed between the City and [291] the Company on July 1, 1925. Electric energy generated at both plants is hereinafter referred to as that originating at Hetch Hetchy.

IX.

Under the contract, by its terms, and as shown by the activities of the contracting parties thereunder:

1. Power developed by the City at Hetch Hetchy is delivered to the Company at its Newark sub-station, 35 miles southeast of San Francisco. Determination of how much electricity shall be accepted at any given time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants. From the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark the City is without power over, and the Company has exclusive and entire control of, its disposition.

2. In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of receipt of the energy from the City

by the Company at Newark and delivery to the ultimate consumers. Deduction of 24 per cent of the Hetch Hetchy energy delivered by the City to the Company at Newark is simply a necessary factor in the formula for ascertainment of the amount to be paid by the Company to the City as a fair price for such energy.

3. By the terms of the contract the Company is required to "account for and pay over to the City for the energy so consigned and delivered to it by the City of Newark for transmission and distribution to consumers as provided in this contract 24.935 per cent of 2.383 cents per kilowatt hour, (the average revenue received by the Company in 1924) for 76 per cent of the energy so consigned and delivered by the City to it at Newark. And the Company shall retain * * * 73.065 per cent as its compensation for services rendered under this contract." The proportional percentages—26.935 and 73.065—were to remain fixed during the life of the contract between the City and the Company. As rates varied, amounts of payments to the City were to be adjusted accordingly.

In actual practice the amount per unit received by the City for its electric energy delivered under the contract has remained constant, despite several reductions in the rates charged by the Company and appreciable fluctuation in the average amount per unit received by the Company from its sale. The price, therefore,

which the City receives for its energy under the contract is in practice fixed and without relation to the actual [292] revenue received from its sale to consumers.

4. With exceptions here immaterial the Company accepts at Newark the entire output of energy from Hetch Hetchy at not to exceed a 75 per cent monthly load factor. Monthly payments by the Company to the City are based upon the amount of energy actually delivered into the Company's system at Newark, or, in event of failure of the Company to take the available output of the City's plant deliverable at Newark under the contract, upon the amount which the City could have delivered at a 75 per cent load factor. The City is assured of payment and the Company is under an absolute duty to pay for the amount of electric energy specified without regard to its acceptance or use.

5. The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission. Under the State Constitution, municipalities are not subject to commission regulation, as a principal the City has power thereunder to fix rates for electric energy produced by it, and sold by an agent, if there be an agent.

6. Electric energy originating at Hetch Hetchy is disposed of by the Company to its

usual customers in the normal course of its retail trade.

7. The Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy including that originating at Hetch Hetchy.

8. Moneys collected by the Company from consumers of power are in no way, arbitrarily or otherwise, segregated or apportioned with regard to the portion thereof deemed attributable to power produced at Hetch Hetchy.

9. To the City the Company makes no accounting of its sales of electricity to consumers. Accounting between the two is limited to monthly statements by the City to the Company for electricity delivered at Newark.

10. The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City.

11. The contract is terminable by either the City or the Company upon one day's notice; and is by its terms subject to cancellation upon request of the Secretary of the Interior should he determine the agreement to be violative of any section of the Raker Act.

X.

The contract between the City and the Company is [293] a contract to sell for resale, and

the disposal of electric energy thereunder by the City to the Company constitutes a sale for resale of, electric energy generated by the City at Hetch Hetchy. The contract to sell contemplates, and the sale of energy thereunder includes, a sale or letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark.

XI.

The contract between the City and the Company and the disposal of electric energy thereunder by the City to the Company includes a sale or letting by the City to the Company of the right to resell or sublet the electric energy so delivered by the City to the Company.

XII.

The Secretary of the Interior is designated by the Raker Act to safeguard the interest of the United States in its grant. Pursuant to such duty imposed by the Act, the Secretary of the Interior determined that the conditions of the Act were not being 'reasonably complied with and carried out by the grantee' and on or about August 24, 1935, notified the City that its disposal of electric energy generated at Hetch Hetchy was in violation of the provisions of the Act quoted in Finding IV. Finally, more than 18 months later and on March 30, 1937,

the City stated that it would continue such disposal until after court action. Thereupon the said Secretary of the Interior, on April 2, 1937, in accordance with the provisions of the Raker Act, requested the Attorney General in the name of the United States to commence suit for the purpose of enforcing and carrying out the provisions of that Act.

XIII.

The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it, and unless restrained will continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract.

Conclusions of Law

From the foregoing Findings of *Act,* the Court reaches the following conclusions of Law:

I.

The contract to sell, and the sale of, electric energy by the City to the Company for resale is a selling or letting to said Company of the right to resell [294] the same, prohibited by and in violation of, the provisions of the Raker Act, prohibiting such selling or letting.

II.

The contract between the City and Company is a grant by the City to the Company of the right to sell electricity produced by the City at Hetch Hetchy, and its performance by the parties is a selling or letting to said Company of the right to resell the same, all within the prohibition of Section 6 of the Raker Act and hence a violation of that statute.

III.

The provisions of Section 6 of the Raker Act are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety. Enforcement of the express terms of the statute is not subject to estoppel or other equitable defense.

The motion of the United States to strike evidence of the City relating to these defenses must be granted and the motion of the City to reopen the case for the introduction of similar evidence must be denied.

IV.

The United States has no plain, speedy or adequate remedy at law.

V.

The United States is entitled to an injunction perpetually restraining the defendant, the City and County of San Francisco, from its present

disposal of said energy, or from any disposal thereof whereby the right to resell such energy is let or sold to any private corporation or individual and in default thereof enjoining and restraining the defendant from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy for such disposal.

Done in Open Court this —— day of May, 1938.

.....

United States District Judge.

Service of the above and receipt of copy thereof acknowledged this 18th day of May, 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT SEARLS
Attorneys for Defendant. [295]

Approved as to Form this 18th day of May, 1938, as provided by Rule 22:

JNO. J. O'TOOLE
DION R. HOLM
ROBERT SEARLS
Attorneys for Defendant."

On May 31, 1938, the attorneys for the defendant duly proposed amendments and additions to the proposed "Findings of Fact and Conclusions of Law" served and lodged by the attorneys for the plaintiff on May 19, 1938, as aforesaid. Defendant's said proposed amendments and additions to said

last mentioned "Findings of Fact and Conclusions of Law", proposed by attorneys for the plaintiff, as aforesaid, read as follows:

[Title of Court and Cause.]

"DEFENDANT'S PROPOSED AMENDMENTS AND ADDITIONS TO 'FINDINGS OF FACT AND CONCLUSIONS OF LAW' PROPOSED BY PLAINTIFF AND SERVED MAY 19, 1938.

The defendant in the above entitled cause, (a) in accordance with Rule 42 of this Court, proposes each of the following amendments and additions to the 'Findings of Fact and Conclusions of Law' in said cause proposed by plaintiff herein, and served upon said defendant on May 19, 1938, and (b) requests a hearing by the Court with respect to said proposed amendments and additions to said proposed Findings.

1. On page 2, line 30 of said proposed Findings, strike out the words: 'and low rate electricity'.

2. On page 3, line 2, after the words 'its lands' insert the words: 'therein described'.

3. On page 3, line 7 of said proposed Findings, after the word 'generated', insert the following:

'The location and extent of the lands and rights of way so granted to defendant under said Raker Act are correctly shown on "Defendant's Exhibit A" in evidence herein'.

4. On page 3, lines 15-16 of said proposed Findings, strike out the words: 'and acquiesced in, and became bound by the terms and conditions thereof.' [296]

5. Page 3, lines 19 to 22, of said proposed Findings, strike out the words:

> 'To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant'.

and commence the following word 'it' with a capital.

6. On page 3, line 27 of said proposed Findings, after Finding 'IV' insert the following:

'IV A

Among the provisions of said Raker Act were the following appearing in Section 9 thereof:

> "(b) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated and which may be so beneficially used by said irrigation

districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein; Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(c) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be [297] made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy as follows: The said grantee shall within three years from the date of

completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further,

said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(d) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires: and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, [298] in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale

of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(e) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee".

7. On page 4, line 1 of said proposed Findings, add the following:

'in connection with the utilization of lands, rights and privileges owned by the City and acquired by it from other sources'.

8. On page 4, line 5 of said proposed Findings, after the word 'United States' insert: 'under the Raker Act'.

9. On page 4, line 6 of said proposed Findings, strike out the word 'it', and in lieu thereof insert the words: 'said project'.

10. On page 4, lines 7 and 8 of said proposed Findings, insert the word 'so' before the word 'acquired' on line 8, and strike out the balance of the sentence.

11. On page 4, line 9 of said proposed Findings, insert a new paragraph to be numbered 'VI A' which shall read as follows:

'VI A

In conformity with the provisions of said Raker Act, and prior to July 1, 1925, the defendant had expended over $45,000,000.00 in the con- [299] struction of dams, aqueducts, and works, designed to store and deliver a municipal water supply to its inhabitants, had built the Early Intake power house, primarily for the supply of power for construction purposes on the project, and had completed the Moccasin power house capable of generating 80,000 horsepower of hydro-electric energy, and a transmission line ade-

quate to transmit said energy to Newark in Alameda County; the defendant had not acquired and never has been financially able to acquire any distribution system in the City and County of San Francisco or elsewhere for the distribution of such electric energy to consumers; the Company and Great Western Power Company (later consolidated with the Company) were at that time the only distributing companies owning electric distribution systems in San Francisco, and each of them declined to sell or lease its distribution system to the defendant for the purpose of enabling it to distribute thereby to its inhabitants the electric energy generated by it in connection with its said Hetch Hetchy project.'

12. On page 4, line 25 of said proposed Findings, after the words 'United States', insert the following:

'in connection with lands, water rights, easements and privileges owned by the City and acquired by it from other sources,'

13. On page 4, line 28 of said proposed Findings, after the figures '1925' insert the following:

'There never has been and there is not any contract or arrangement between the City and the Company with respect to the delivery and/or distribution of said electric

energy, other than said contract of July 1, 1925'.

14. On page 4, line 29 of said proposed Findings, after the words: 'Hetch Hetchy' insert the following:

'About 3 per cent. of the energy so generated and transmitted is produced in a power plant known as the Early Intake power plant, which is situate on lands granted to the City under the terms of said Raker Act; that the remaining 97 per cent. of said energy is generated in the Moccasin Creek power plant, which is situated entirely on patented land owned by the City, and that the electric energy generated therein, together with the surplus energy from the Early Intake plant, is transmitted from Moccasin power plant to Newark in Alameda County, over lands owned by the City and not acquired by it under the terms of the Raker Act; the only use made by the City of rights granted to it under the Raker Act in connection with said Moccasin Creek plant is the storage of water in the Hetch Hetchy Valley and at Lake Eleanor, partially on [300] lands granted under the Raker Act, and the transmission of said water through tunnel aqueducts and canals partially on lands granted under the Raker Act; the primary purpose of said reservoirs and aqueducts is to transmit water to San Francisco for municipal water supply purposes; said water would be so transmitted whether the Moccasin Creek power plant,

which is on the line of the water conduit, were operated or not'.

15. On page 5, strike out lines 3 and 4 of said proposed Findings, and in lieu thereof insert the following:

'In carrying out said contract of July 1, 1925, the City and the Company have proceeded as follows:'

16. On page 5, line 7 of said proposed Findings, insert before the word 'Determination' the words: 'Subject to the provisions of said contract', and change the 'D' in 'Determination' to a small letter.

17. On page 5, line 14 of said proposed Findings, insert after the word 'disposition', the words:

'but in a physical sense only and subject to the provisions of said contract of July 1, 1925'.

18. On page 5, line 16 of said proposed Findings, strike out the words: 'it is provided that from' and in lieu thereof insert the words: 'the parties to said contract deducted'

19. On page 5, lines 17 and 18 of said proposed Findings, strike out the words: 'shall be deducted' and in lieu thereof insert the word: 'thereof'.

20. On page 5, lines 19 and 20 of said proposed Findings, strike out the words: 'of receipt' which are repetitious.

21. On page 5, lines 21 to 25 of said proposed Findings, strike out the sentence commencing with the words: 'Deduction of 24 per cent' and ending with the words: 'for such energy'.

22. On page 6, line 14 of said proposed Findings, strike out the words: 'under the contract' and insert the word 'exact' at the end of said line.

23. On page 6, line 16 of said proposed Findings, after the word: 'consumers' insert the following:

'to the extent that payments made to the City are computed in accordance with the formula prescribed in said contract, and have not taken into account changes made by the Railroad Commission of Calif- [301] ornia in each of the years 1935, 1936 and 1937, in respect of the rates chargeable to consumers".

24. On page 6, between lines 16 and 17 of said proposed Findings, insert three new paragraphs to be numbered '3a', '3b' and '3c', which shall read as follows:

'3a. In and by said contract of July 1, 1925, it is provided that the rates at which the electric energy delivered by the City to the Company under said contract shall be sold to consumers in the City and County of San Francisco, shall be those fixed by the Railroad Commission of the State of California; said rates are the rates which at all

times since July 1, 1925 have been and are now operative and binding upon the Company with respect to all electric energy generated by it which it sells in said City and County of San Francisco; said rates were adopted by the City and the Company in and by said contract of July 1, 1925, as the rates which should be charged to consumers of the electric energy generated by the City and delivered by it to the Company for transmission and distribution, as provided in said contract, for the reason that it would be impractical to charge consumers of electric energy generated by the Company at one rate, and to charge consumers of the electric energy generated by the City at a different rate;

Sb. Since the execution of said contract of July 1, 1925, the City has received and is still receiving for the electric energy delivered by it to the Company the percentage of the average rate paid to the Company by consumers in the City and County of San Francisco, which in and by said contract it is provided that it shall receive; said average rate as fixed by said contract has remained constant, however, and has not been varied to conform to the rates fixed by the Railroad Commission of California in the years since the execution of said contract; as the result of the failure to vary said average rate of return to conform to the rates fixed by said

Railroad Commission; the City has received from the Company $25,000.00 more than it would have received if said return had varied in conformity with the rates fixed by said Railroad Commission as by said contract it is provided that said return should vary;

3c. The net revenue to the City from the disposition and distribution of the electric energy generated by it, in accordance with the aforesaid contract of July 1, 1925, between the City and the Company, is and at all times has been approximately $2,200,000.00 per year.' [302]

25. On page 6, lines 25 to 28, inclusive, of said proposed Findings, strike out the sentence commencing with the words: 'The City is assured' and ending with the words: 'its acceptance or use'.

26. On page 6, lines 30 and 31 of said proposed Findings, after the words: 'are fixed', strike out the words: 'not by the City but by the State Railroad Commission', and in lieu thereof insert the following:

'not by the Railroad Commission of California, but by the City, which, however, adopts the rates prescribed by said Railroad Commission of California, as the rates which may be charged by private utility corporations to consumers of electric energy'.

27. On page 7, lines 4 to 6 of said proposed Findings, strike out all of the paragraph numbered 6 and in lieu thereof insert the following:

'6. Electric energy originating at Hetch Hetchy is distributed by the Company, in the normal course of its business, to the persons, firms and corporations who are customers therefor at the time of distribution'.

28. On page 7, lines 14 to 17 of said proposed Findings, strike out all of paragraph '9' and in lieu thereof insert the following:

'Except as next stated, the Company makes no accounting to the City of its sales of electricity to consumers. The amount of electricity delivered to the Company by the City at Newark is determined by joint meter readings at Newark, and the formulae specified in the contract of July 1, 1925, are applied to said quantity and the City merely bills the Company for said quantity in accordance with said formulae'.

29. On page 7, lines 21 and 22 of said proposed Findings, strike out the words: 'for sale of Hetch Hetchy power to the Company by the City', and in lieu thereof insert the following:

'of July 1, 1925. The power so purchased by the City from the Company, however, has different characteristics from that delivered by the City to the Company at Newark; after

receiving the energy at Newark the Company steps down the voltage of said energy and regulates it through transformers and condensors; for municipal railway use, it converts a large part of the current from alternating current with a 60 cycle frequency to direct current having no frequency, radically changes the load factor, and, by its standby service, protects the City's requirements [303] for electric energy for the various purposes for which it is used by the City'.

30. On page 7, line 25 of said proposed Findings, after the word: 'cancellation' insert the words: 'by the parties'.

31. On page 7 of said proposed Findings, strike out all of paragraph 'X' from the 'Findings of Fact', because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the 'Conclusions of Law', if the subject matter is to be, at all, included in the 'Findings of Fact and Conclusions of Law', in said cause.

32. On page 8 of said proposed Findings, strike out all of paragraph 'XI' from the 'Findings of Fact', because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the 'Conclusion of Law', if the subject matter thereof is to be, at all, included in the 'Findings of Fact and Conclusions of Law', in said cause.

33. On page 8, line 16 of said proposed Findings, change the figure 'XII' to 'X'.

34. On page 9 of said proposed Findings, strike out the figure 'XIII' and all of the paragraph of that number, and in lieu thereof insert the following:

'XI.

Unless restrained by this Court, the City will continue to dispose of the electric energy generated by it at Hetch Hetchy in the manner hereinbefore stated'.

35. On page 9, line 10 of said proposed Findings, insert four new paragraphs to be numbered: 'XII', 'XIII', 'XIV' and 'XV', which shall read, respectively, as follows:

'XII.

The manner of disposition and distribution by the City of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with the aforesaid contract of July 1, 1925, ("United States Exhibit 6"), has not, at any time, damaged, and does not damage, the plaintiff in any respect or to any extent or in any amount;

XIII.

If the City shall be prevented from disposing of the electric energy generated by it in connection with its Hetch Hetchy project, as provided in said contract of July 1, 1925

("United States Exhibit 6"), or in some other manner by which it shall be permitted to use the transmission [304] and distribution facilities of a private corporation for such purpose, it will suffer a loss of approximately $2,200,000.00 per year and will be damaged in that amount and to that extent.

XIV.

Any sudden disruption of operations under said contract of July 1, 1925, ("United States Exhibit 6") or any sudden cessation of the disposal and distribution of the electric energy generated by the City at its above mentioned power plants in connection with the so-called Hetch Hetchy water project, in the manner provided in said contract, would result in serious economic waste; for said reason, the City should be allowed a reasonable period within which to provide a mode of disposing of and distributing said electric energy, which will not violate the provisions of the Raker Act; a reasonable period to allow the City for said purpose is one year, to commence on the day when the decree herein shall become final; the injunction to be issued herein should not be issued prior to the expiration of said period.

XV.

It is appropriate that the Court reserve jurisdiction of the cause for the purpose of

modifying its Decree to be entered herein, so as to permit the City to transmit and distribute the electric energy generated by it in connection with its said Hetch Hetchy project, either by contract with a private corporation, or otherwise, in a manner which will not constitute a violation of the Raker Act'.

36. On page 9, lines 18 to 22, inclusive, of said proposed Findings, strike out the first of the 'Conclusions of Law' and in lieu thereof insert the following:

'The contract of July 1, 1925 is a contract to sell for resale the electric energy generated by the City at Hetch Hetchy; said contract contemplates a sale of electric energy thereunder, includes a sale to the Company by the City of the right to resell the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark; said contract is prohibited by and is in violation of the provisions of the Raker Act prohibiting such sale'.

37. On page 9, strike out the second of the 'Conclusions of Law' and in lieu thereof insert the following:

'The contract between the City and the Company is a grant by the City to the Company of the right to sell the electric energy generated by the City at Hetch Hetchy and is

a [305] selling to the Company of the right to sell said electric energy in violation of the prohibition of Section 6 of the Raker Act'.

38. On page 10, lines 9 to 12: Strike out the sentence within these lines commencing with the words: 'The motion of the United States' and ending with the words: 'must be denied', because the orders relating to the motions mentioned are intermediate orders, unrelated to the decision of the case, and have no place in the Findings of Fact or Conclusions of Law.

39. On page 10, line 19, before the words: 'United States', insert the following:

'Subject to the provisions of the next succeeding paragraph "VI" hereof,'

40. On page 10, line 28, insert the following:

'The United States is entitled to a decree which shall order, adjudge and decree as follows:

(1) That, one (1) year after this Decree shall have become final, either through the lapse of the time limited for an appeal therefrom without any appeal having been taken, or through the affirmance by the Court, which shall have finally disposed of any appeal taken therefrom, the Clerk of this Court issue out of this Court and under the seal thereof, a Writ of Injunction directed to the

defendant and enjoining and restraining it from distributing or otherwise disposing of the electric energy generated by it at Moccasin Creek Power House and/or Early Intake Power House in connection or in conjunction with its so-called Hetch Hetchy Water project, in the manner provided in said contract of July 1, 1925, ("United States Exhibit 6"), and directing that unless it shall cease from distributing or otherwise disposing of said electric energy in the manner provided in said last mentioned contract, it be enjoined and restrained from using for the generation and transmission of said electric energy, any of the rights granted to it in and by the Statute of the United States, approved December 19, 1913 (38 Stats. at L. 241) commonly known as and called the Raker Act.

(2) That each of the parties hereto bear and pay its costs of suit herein.

(3) That the defendant shall have the right to submit to the Court at any time any plan, contract or arrangement for the transmission, distribution and disposal of the electric energy generated by it in connection with its Hetch Hetchy project which, in its opinion, does not constitute a violation of the provisions of [306] said Raker Act, and to apply to the Court at the foot of the decree for a modification of said decree and of the injunction thereby directed to issue, which will per-

mit it to transmit, distribute and dispose of said electric energy in accordance with such plan, contract or arrangement, and the Court hereby retains jurisdiction of the cause for the purpose of entertaining such application, if any be made, and of granting the same if, upon the proof offered in support thereof, it shall seem proper so to do.'

By proposing the foregoing Amendments and Additions to said 'Findings of Fact and Conclusions of Law' served May 19, 1938, as aforesaid, the defendant (1) does not concede or admit that the Findings of Fact and Conclusions of Law so proposed to be modified by said proposed amendments and additions, would be a proper Finding of Fact and/or Conclusion of Law to be made by this Court in said cause, if modified as proposed; (2) does not waive its right to object to any of said Findings of Fact and Conclusions of Law, as modified, if the proposed modification thereof, be allowed and adopted; and (3) does not concede, but, on the contrary, denies that any of the so-called Findings of Fact contained in paragraph IX of said proposed 'Findings of Fact and Conclusions of Law', so served on May 19, 1938, or any of the other so-called Findings of Fact contained in said proposed 'Findings of Fact and Conclusions of Law', so served May 19, 1938, which purports to construe the meaning or effect of

the aforesaid contract between the City and the Company dated July 1, 1925, is a proper subject matter of a finding of fact."

Dated: June 1, 1938.

Respectfully submitted,
JNO. J. O'TOOLE,
DION R. HOLM,
Attorneys for Defendant.

ROBERT M. SEARLS,
Of Counsel for Defendant.

Service of the foregoing Amendments and Additions proposed by the defendant to the Draft of Findings of Fact and Conclusions of Law in the above cause, proposed by the Plaintiff, is hereby acknowledged this 31st day of May, 1938.

FRANK J. HENNESSY,
Attorney for Plaintff."

On June 3, 1938, a hearing was had before the Court to settle the Findings of Fact and Conclusions of Law in said cause. [307]

At said hearing of June 3, 1938, for the settlement of the "Findings of Fact and Conclusions of Law" in said cause, counsel for the plaintiff consented that the requests contained in the paragraphs numbered 1, 2, 8, 9, 10, 20, 30 and 38 of Defendant's said "Proposed Amendments and Additions to 'Findings of Fact and Conclusions of Law' Proposed by Plaintiff", (hereinafter, for brevity, called

"Defendant's Proposed Amendments") which were served and lodged on May 31, 1938, as aforesaid, be granted. At said hearing for the settlement of "Findings of Fact and Conclusions of Law" in said cause, counsel for the plaintiff, also, consented that the Court might strike out the words "to its inhabitants" appearing in paragraph IV (on line 20 of page 3) of Plaintiff's said proposed "Findings of Fact and Conclusions of Law" which was part of the matter contained in the paragraph numbered 5 of Defendant's aforesaid proposed amendments.

At said hearing of June 3, 1938, counsel for the plaintiff opposed the allowance of each and every of the requests contained in the other numbered paragraphs of defendant's said proposed amendments and additions to plaintiff's proposed "Findings of Fact and Conclusions of Law".

At said hearing of June 3, 1938, the Court allowed all of defendant's proposed amendments to said "Findings of Fact and Conclusions of Law", to the allowance of which counsel for the plaintiff consented as aforesaid, and took under submission for further consideration all of defendant's other proposed amendments to plaintiff's proposed "Findings of Fact and Conclusions of Law".

On June 24, 1938, the Court made, signed and filed its "Findings of Fact and Conclusions of Law" in said cause (said Findings of Fact and Conclusions of Law are not incorporated herein except by reference as they appear elsewhere in the record), and, except as next hereinafter stated, omitted

therefrom all of the matters covered by Defendant's said proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law", which it had not allowed at said hear- [308] ing, with consent of counsel for the plaintiff, as aforesaid, and, except as next hereinafter stated, impliedly denied and disallowed in toto each and all of defendant's said other proposed amendments to plaintiff's said proposed "Findings of Fact and Conclusions of Law".

The exceptions mentioned in the last preceding sentence are as follows:

(a) In sub-paragraph 4 of Paragraph IX of the Court's "Findings", the word "direct" appearing between the words "without relation" was inserted by the Court, instead of the word "exact", as requested by defendant in the paragraph numbered 22 of its aforesaid proposed amendments.

(b) The Court omitted from its Findings, the words "and became bound by", which appeared in paragraph III of plaintiff's said proposed Findings, and were part of the words sought to be stricken out in the paragraph numbered 4 of defendant's said proposed amendments.

(c) The Court did not include in its said Findings the paragraph numbered XI in plaintiff's said proposed Findings, and thereby allowed the amendment requested in paragraph 32 of defendant's said proposed amendments.

(d) The Court included in its "Conclusions of Law", a paragraph numbered "V", which incorpo-

rates a part of the request contained in sub-paragraph 3 of the paragraph numbered 40 of defendant's aforesaid proposed amendments.

The rulings of the Court which denied defendant's requests contained in the paragraphs numbered 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 34, 35, 36, 37, 39 and 40 of defendant's aforesaid proposed amendments and refused to find in accordance therewith, and defendant's exceptions to said respective rulings are here designated as Rulings and Exceptions [309] 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66, respectively.

As hereinbefore stated counsel for the defendant duly excepted to certain of the findings of fact contained in the Opinion of the Court rendered and filed herein on April 11th, 1938, as aforesaid, and to the rulings involved in the making of said findings of fact. The findings of fact contained in said Opinion to which counsel for the defendant excepted and the numbers of the rulings and exceptions with respect to the same are as next stated:

(a) The finding that the provisions of Section 6 of the Raker Act are an integral part of a statute enacted by Congress in the exercise of its law-making power and not provisions set up by the Congress in the exercise of proprietary powers of the United States.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 67.

(b) The finding that "the City itself purchases electricity from the Company just as any other customer does".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 68.

(c) The finding that "control of Hetch Hetchy power is in the hands of the Company from the moment that City electricity enters the Company's lines at Newark".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 69.

(d) The finding that "rates to be charged consumers of Hetch Hetchy power are not fixed by the City". [310]

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 70.

(e) The finding that electrical energy "cannot be allocated on a pro rate basis when a commingling occurs".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 71.

Counsel for the defendant, also, duly excepted to certain of the conclusions of law contained in the Opinion of the Court rendered and filed in said cause on April 11, 1938, as aforesaid, and to the rulings involved in the drawing of said conclusions of law. The conclusions of law in said Opinion to

which counsel for the defendant excepted and the numbers of the rulings and exceptions with respect to the same, are as next stated:

(a) The conclusion of law that the agreement of July 1, 1925, between the City and the Company is "one of sale, with title to the electricity passing to the Company at Newark".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 72.

(b) The Conclusion of Law that the arrangement for the distribution and disposal of electric energy effected by the agreement of July 1, 1925, between the City and the Company complied "neither with the letter nor the spirit of the Federal Grant by means of which San Francisco was enabled to construct the Hetch Hetchy project".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 73.

(c) The Conclusion of Law that "the Raker Act is not being [311] complied with by San Francisco".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 74.

(d) The Conclusion of Law that the plaintiff "is entitled to an injunction directing the City to cease its present disposal of electric power or be restrained from using the rights granted by the Raker Act for the generation and transmission of such power".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 75.

(e) The implied Conclusion of Law that the provisions of Section 6 of the Raker Act are conditions, the violation of which would involve or justify a forfeiture of the or any of the rights granted by the Raker Act.

The ruling involved in the drawing of said implied conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 76.

(f) The Conclusion of Law that the City should be restrained from using, for the generation and transmission of electric energy, the rights granted by the Raker Act, unless it desists from distributing and disposing of said electric energy in accordance with the agreement of July 1, 1925, between it and the Company.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 77.

Counsel for the defendant, also, duly excepted to certain of the findings of fact included in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause by the Court on June 24, 1938, as aforesaid, and to the rulings involved in the making of said [312] findings of fact. The last mentioned findings of fact to which counsel for the defendant excepted, and the numbers of the rulings

and exceptions with respect to the same are as next stated:

(a) The Finding (in Paragraph IV of the Court's "Findings of Fact") that the provisions of Section 6 of the Raker Act were incorporated in said Act to insure the direct distribution of electricity by the City.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 78.

(b) The Finding (in Paragraph IV of the Court's "Findings of Fact") that the provisions of Section 6 of the Raker Act were incorporated in said Act "to prevent enjoyment by private corporations of any profits from the" grant made by the Raker Act.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 79.

(c) The implied Finding (in Paragraph IV of the Court's "Findings of Fact") that the City is now generating and transmitting electricity, solely, through the utilization of the lands, rights and privileges granted to it by the Raker Act and not through the use of said lands, rights and privileges in conjunction with the use of said lands, rights and privileges owned by the City and acquired by it from persons, firms and corporation, other than the United States.

The ruling involved in the making of said implied finding and the defendant's exception thereto

are here designated as Ruling and Exception No. 80.

(d) The Finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact") that "determination of how much electricity shall be accepted at any time is made by the load dispatcher of the Com- [313] pany, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants", which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 81.

(e) The Finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact") that "from the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark, the City is without power over, and the Company has exclusive and entire control of, its disposition" which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 82.

(f) The Finding (in subparagraph 2 of Paragraph IX of the Court's "Findings of Fact") that "In determining the amount which should be paid to the City, it is provided that from the amount of

energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of the energy from the City by the Company at Newark and delivery to the ultimate consumers", which said finding is unqualified and treats the 24 per cent deduction mentioned therein as a mere factor for determining the price to be paid by the Company to the City, and gives no effect to the fact that 24 per cent is the amount of transmission, substation and distribution losses, actually found by experience to occur between Newark and consumers' meters in San Francisco. [314]

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 83.

(g) The finding (in subparagraph 3 of Paragraph IX of the Court's "Findings of Fact") that "The price which the City receives for its energy under the contract is in practice fixed and without direct relation to the actual revenue received from its sale to consumers", which said finding is unqualified and gives no effect to the fact that the price which the City receives from the Company is without direct relation to the actual revenue received by the Company from its sales to consumers only in the sense and to the extent that payments made to the City have been computed in accordance with the formula specified in the agreement of July 1, 1925, and have not taken into account certain de-

ductions in rates made by the Railroad Commission of the State of California in each of the years 1935, 1936 and 1937.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 84.

(h) The unqualified finding (in subparagraph 5 of Paragraph IX of the Court's "Findings of Fact") that "The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 85.

(i) The unqualified finding (in subparagraph 6 of Paragraph IX of the Court's "Findings of Fact") that the "Electric energy originating at Hetch Hetchy is disposed of by the Company to its usual customers in the normal course of its retail trade", without qualifying said finding by the further finding that said customers of the Company were, also, in fact, customers of the defendant. [315]

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 86.

(j) The unqualified finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact") that "To the City the Company makes no accounting of its sales of electricity to consumers".

The ruling involved in the making of said finding

and the defendant's exception thereto are here designated as Ruling and Exception No. 87.

(k) The finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact") that the accounting between the City and the Company "is limited to monthly statements by the City to the Company for electricity at Newark".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 88.

(l) The unqualified finding (in subparagraph 10 of Paragraph IX of the Court's "Findings of Fact") that "The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 89.

(m) The finding (in Paragraph X of the Court's "Findings of Fact") that the contract between the City and the Company is a contract to sell for resale.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 90. [316]

(n) The finding (in Paragraph X of the Court's "Findings of Fact") that the disposal of electric energy by the City to the Company under the contract of July 1, 1925, constitutes a sale for resale of

electric energy generated by the City at Hetch Hetchy.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 91.

(o) The finding (in Paragraph X of the Court's "Findings of Fact") that "The contract to sell contemplates, and the sale of energy thereunder includes, a sale and letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 92.

(p) The finding (in Paragraph XII of the Court's "Findings of Fact") that "The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 93.

(q) The finding (in Paragraph XII of the Court's "Findings of Fact") that unless restrained, the City will "continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract" of July 1, 1925.

The ruling involved in the making of said finding and the defendant's exception thereto are here

designated as Ruling and Exception No. 94. [317]

Counsel for the defendant, also, excepted to certain of the Conclusions of Law contained in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause by the Court on June 24, 1938, as aforesaid, and to the rulings involved in the drawing of said conclusions of law. The last mentioned conclusions of law to which counsel for the defendant excepted, and the numbers of the rulings and exceptions with respect to the same are as next stated:

(a) The conclusion of law (in Paragraph I of the Court's "Conclusions of Law") that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, "includes a selling and letting by the City to the Company of the right to sell or sublet" such energy.

The ruling involved in the drawing of said conclusions of law and the defendant's exception thereto are here designated as Ruling and Exception No. 95.

(b) The conclusion of law (in Paragraph I of the Court's "Conclusions of Law") that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, is within the prohibition of Section 6 of the Raker Act.

The ruling involved in the drawing of said conclusions of law and the defendant's exception thereto are here designated as Ruling and Exception No. 96.

(c) The conclusion of law (in Paragraph III of the Court's "Conclusions of Law") that the provisions of Section 6 of the Raker Act "are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 97.

[318]

(d) The conclusion of law (in Paragraph II of the Court's "Conclusions of Law") that enforcement of the express provisions of Section 6 of the Raker Act "is not subject to estoppel or other equitable defense".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 98.

(e) The conclusion of law (in Paragraph III of the Court's "Conclusions of Law") that the United States has no plain, speedy or adequate remedy at law.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 99.

(f) The conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that the plaintiff is entitled to an injunction perpetually restraining the defendant from disposing, in accordance with the agreement of July 1, 1925, between the defendant and the Company, of electric energy gen-

erated by the City in connection with its Hetch Hetchy project.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 100.

(g) The implied conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that the provisions of Section 6 of the Raker Act are conditions, the violation of which by the defendant would entail or justify a forfeiture of the or some of the rights granted by the Raker Act.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 101. [319]

(h) The conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that in default of desisting from its disposal, in accordance with the agreement with the Company dated July 1, 1925, of the electric energy generated by it in connection with its Hetch Hetchy project, the defendant be enjoined and restrained from utilizing, for such disposal, the lands, rights and privileges granted to it, by the Raker Act for the purpose of generating electric energy.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 102.

On June 28, 1938, and before the making, filing or entry of the Decree in said cause as hereinafter stated, the Court made an order, nunc pro tunc as of April 11, 1938, by which it denied defendant's motion for a dismissal of said cause made at the conclusion of the hearing as hereinbefore stated.

The defendant duly excepted to said order and to the ruling involved; said ruling and defendant's exception thereto being here designated as Ruling and Exception No. 103.

On June 28, 1938, the Decree in said cause was made, filed and entered therein. Said Decree is not incorporated in this Statement except by reference, because it appears elsewhere in the record herein. The defendant duly excepted to said Decree and to each and every of the provisions thereof. The ruling involved in said Decree and defendant's exception thereto are here designated as Ruling and Exception No. 104.

On July 8, 1938, within the time allowed by law and the rules of this Court, the defendant filed a Petition for a Rehearing of said cause, and, on the same day, the Court made and there was filed an order entertaining said Petition for Rehearing. Thereafter, on July 11, 1938, within the time allowed by law and the rules of this Court, [320] the plaintiff filed an Answer to said Petition for Rehearing. Said Petition for Rehearing was argued and submitted on July 26, 1938, and on the same date was denied by the Court, by its Order that day made. Neither said Petition for Rehearing nor

said Order entertaining it, nor plaintiff's Answer to it, nor the Order of Court denying it, are included herein, for the reason that they appear, elsewhere, in the record herein. The defendant duly excepted to the Court's order denying its said Petition for Rehearing. The ruling involved in said Order and Defendant's Exception thereto are here designated as Ruling and Exception 105.

STIPULATION AS TO CORRECTNESS OF STATEMENT OF EVIDENCE.

It is hereby stipulated by and between the parties hereto that the foregoing is a full, true and correct statement of all evidence offered or received and of all proceedings had and taken on the hearing of the above entitled cause, and that said statement may be approved by the above entitled Court or a Judge thereof without notice to either of the parties thereto.

Dated: November 7th, 1938.

FRANK J. HENNESSY,
W. E. LICKING,
Attorneys for Plaintiff.
JOHN J. O'TOOLE,
DION R. HOLM,
ROBERT M. SEARLS,
Attorneys for Defendant. [321]

APPROVAL OF STATEMENT OF EVIDENCE

It appearing that the foregoing Statement of Evidence in the above entitled cause is true and complete in all respects, and that it has been properly prepared, the same is hereby approved as a full, true and correct statement of the evidence in said cause.

Dated: December 20th, 1938.

MICHAEL J. ROCHE
United States District Judge

Receipt of a copy of the foregoing Statement of Evidence, Stipulation and Order is hereby admitted this 20th day of December 1938.

FRANK J. HENNESSY
W. E. LICKING
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 20, 1938. [322]

[Title of District Court and Cause.]

ORDER DEFERRING CONSIDERATION OF SUSPENSION OF INJUNCTION

Whereas, the defendant in the above entitled proceeding has this day filed its petition for an order allowing an appeal from the judgment heretofore entered therein, and in said petition there is incorporated a prayer for the suspension of operation of the injunction granted by the judgment herein, pending the determination of said appeal; and

Whereas, in the opinion of this Court said application for suspension should be passed upon by the Honorable Michael J. Roche, District Judge, who tried the above entitled cause and entered the judgment therein; and [323]

Whereas, said Honorable Michael J. Roche is absent on vacation and will not return until after the statutory period allowed for said appeal will have passed;

Now, therefore, it is hereby ordered that consideration of the defendant's application for such suspension of injunction is hereby continued to the 7th day of November, 1938, and the Clerk of the Court is directed to place said matter on the calendar of Judge Roche's Department for hearing on said date.

Dated: October 17, 1938.

A. F. ST. SURE
District Judge

[Endorsed]: Filed Oct. 17, 1938. [324]

[Title of District Court and Cause.]

STIPULATION RESPECTING PROCEDURE TO GOVERN APPEAL

Whereas, the decree in the above entitled cause was made, filed and entered on June 28, 1938; and

Whereas, the defendant in said cause intends to appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the rules adopted by the Supreme Court of the United States, pursuant to the Act of June 19, 1934, Ch. 651 (hereinafter called the "new" rules) become effective September 17, 1938, in accordance with the provisions of Rule 86 thereof; and [325]

Whereas, it is uncertain whether (in the absence of this stipulation) said new rules would apply to or govern proceedings in connection with the appeal so to be taken by the defendant in said cause, from said decree, in view of the fact that said decree was entered prior to the effective date of said rules; and

Whereas, the defendant in said cause has already proceeded with the preparation of a statement of the case, assignment of errors and other papers for use on its said appeal, in compliance with the procedure required by the rules of procedure now in force which are applicable to appeals in equity causes (and hereinafter called the "old procedure") upon the assumption that said old procedure is applicable to and governs its said appeal; and

Whereas, it is believed by the parties hereto that the application of said new rules to the appeal so to be taken from the decree in said cause by said defendant, would not be feasible and will work injustice in view of the above mentioned circumstances.

Now, therefore, it is hereby stipulated and agreed by and between the respective parties hereto that the above entitled Court and said United States Cir-

cuit Court of Appeals for the Ninth Circuit, in accordance with Rule 86 of said rules adopted by the Supreme Court of the United States, and effective September 17, 1938, may each (without notice to either of the parties hereto) make an order providing that said rules effective September 17, 1938, shall not apply to or govern said appeal from said decree so to be taken by the defendant in said cause, or any matter connected with or relating to said appeal, but that the procedure now in force and governing appeals in equity causes shall apply to and shall govern [326] defendant's said appeal from said decree and all matters connected with or relating to said appeal.

Executed in Quadruplicate.

Dated: August 26th, 1938.

FRANK J. HENNESSY
W. E. LICKING
FREDERIC L. KURGIS
per F. J. H.
Attorneys for Plaintiff

JOHN J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant

[Endorsed]: Filed Aug. 26, 1938. [327]

[Title of District Court and Cause.]

ORDER RESPECTING PROCEDURE GOVERNING APPEAL

The parties hereto having this day filed herein a stipulation providing that the rules adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1938, Chapter 651, which become effective September 17, 1938, shall not be applicable to or govern the appeal to be taken by the defendant in the above entitled cause to the United States Circuit Court of Appeals of the Ninth Circuit from the decree made, filed and entered in said cause on June 28, 1938, but that the procedure now in force and governing appeals in equity causes shall apply to and govern said appeal, and all matters connected with or related to the same,

Now, therefore, for reasons stated in said stipulation

(1) It is the opinion of this Court that the application of said rules adopted by the Supreme Court of the United States and effective September 17, 1938, to the appeal from said decree so to be taken by the defendant in said cause, or to any matter connected with or related to said appeal, would not be feasible and would work injustice to the parties to said cause; and

(2) It is hereby ordered, in accordance with the provisions of Rule 86 of said rules effective September 17, 1938, that said last mentioned rules shall not apply to or govern said appeal from said decree so to be taken by the defendant in said cause, or to any

matter connected with or related to said appeal, but that the procedure now in force and governing appeals in equity causes shall apply to and shall govern said appeal and all matters connected with or related to the same.

Done in open court this 28th day of August, 1938.

MICHAEL J. ROCHE
United States District Judge

Approved as to form.

FRANK J. HENNESSY
U. S. Attorney

[Endorsed]: Filed Aug. 26, 1938.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the City and County of San Francisco, a Municipal Corporation, Defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Decree in said cause which was made, filed and entered therein on June 28, 1938.

Dated: October 17th, 1938.

JOHN J. O'TOOLE
City Attorney
DION R. HOLM
Assistant City Attorney
ROBERT M. SEARLS

[Endorsed]: Filed Oct. 17, 1938. [328]

[Title of District Court and Cause.]

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Michael J. Roche, Judge of the Southern Division of the United States District Court for the Northern District of California:

The above defendant feeling aggrieved by the decree made and entered in this cause on June 28, 1938, by which the defendant was enjoined, among other things, from disposing of the electric energy, generated by it in connection with its Hetch Hetchy Project, pursuant to the terms of a contract between the defendant and Pacific Gas and Electric Company dated July 1, 1925, or in the manner provided in said contract, and from using, for the development and transmission of said electric energy, any of the lands, rights and [329] privileges granted to it by the Raker Act, if it fails to desist from disposing of said electric energy, in accordance with the terms of said contract of July 1, 1925, hereby

(1) appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and

(2) prays (a) that its said appeal be allowed; (b) that a citation to the plaintiff issue as provided by law; (c) that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to said United States

Circuit Court of Appeals; (d) that the proper order be made respecting the security to be required of it to perfect its said appeal, and (e) that, in connection with the allowance of its said appeal, the Court, as authorized by Equity Rule 74, make an order suspending, during the pendency of said appeal and until the final determination thereof, the injunction which, by its said decree, it directed to be issued.

Dated: October 17, 1938.

JOHN J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant

[Endorsed]: Filed Oct. 17, 1938. [330]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

City and County of San Francisco (a municipal corporation), defendant in the above entitled cause, filing herewith its petition praying that it be allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of this Court in favor of the plaintiff in said cause and against it, which was made and entered herein on June 28th, 1938, now assigns the following, as errors made by the court in its rulings upon the hearing of said cause and in its Findings of Fact

and Conclusions of Law, made and filed in said cause and in its said decree therein, to-wit: [331]

Assignment No. 1:

That said Court erred in overruling the objection of the defendant to the admission in evidence of, and in admitting in evidence, "U. S. Exhibit No. 2", being an Ordinance passed by the Board of Supervisors of the City on December 12, 1913, approved by the Mayor of the City on January 13, 1914, and filed with the Secretary of the Interior of the United States on January 21, 1914, whereby the City accepted the grant made by the Raker Act upon the terms and conditions stated in said Act. The objection to the admission in evidence of said Ordinance was that it was irrelevant, incompetent and immaterial, and that said Board of Supervisors of the City and County of San Francisco had no power to restrict the City in the particular method of distribution of its electric power which it might employ, inasmuch as the determination of said matter rested entirely with the citizens of said City and County. Counsel for the defendant duly excepted to the ruling of the Court overruling said objection to said Ordinance and in admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 1;

Assignment No. 2:

That said Court erred in overruling the objection of the defendant to the admission in evidence of,

and in admitting in evidence, "U. S. Exhibit No. 7", being a telegram dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of the City and County of San Francisco, by which said Secretary of the Interior informed the Mayor that, in view of charges that the Raker Act was being violated by the City's arrangement with the Company, he had arranged for a hearing on the subject, in his office on May 6, 1935, at 2 o'clock P. M., and expressed the hope that the City would be represented at said hearing.

The objection to the admission of said telegram in evidence was that it was irrelevant, incompetent, and immaterial, and a mere self-serving declaration. Counsel for the defendant duly excepted to the ruling of the Court, overruling the objection to said telegram and admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 2; [332]

Assignment No. 3:

That said Court erred in overruling the objection of the defendant to the admission in evidence of, and in admitting in evidence, "U. S. Exhibit No. 8," being a certified copy of a letter dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to H. G. Cahill, Manager of Public Utilities of San Francisco, wherein Mr. Ickes informed Mr. Cahill that he approved the revised plans and specifications for the enlargement of the Hetch Hetchy Dam, but that a question having been raised as to

whether the provisions of the Raker Act were being violated by the existing arrangement with Pacific Gas & Electric Company, permission to proceed with the addition to the Hetch Hetchy Dam was not to be regarded as a direct or an implied approval of that arrangement, and, further, that an open hearing, on the question whether the Raker Act was being violated by said arrangement would be held in this office on May 6, 1935, at two o'clock P. M., at which he hoped the Commission would be represented. The objection to said Exhibit was that it was irrelevant, incompetent, and immaterial and self-serving; and that the defendant was not making any claim that the approval of the Secretary of the Interior to the enlargement of the Hetch Hetchy Dam, in accordance with plans and specifications heretofore submitted to him, was a waiver of any right of the plaintiff under the Raker Act. Counsel for the defendant duly excepted to the ruling of the Court overruling its objection to said letter, and admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 3.

Assignment No. 4:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, "U. S. Exhibit No. 9," being a certified copy of a telegram dated March 14, 1935, from [333] Angelo J. Rossi, Mayor of San Francisco, to Harold L. Ickes, Secretary of the Interior,

in which the Mayor acknowledged the receipt of Mr. Ickes's wire of the same date, noted the statement that charges had been "filed" claiming that the City was violating the Raker Act in the distribution of power, asked for copies of said charges, and stated that the City would be represented at the hearing of May 6th. The objection to said Exhibit was that it was incompetent, irrelevant and immaterial. Counsel for the defendant duly excepted to the ruling of the Court overruling its objection to said telegram and admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 4.

Assignment No. 5:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, "U. S. Exhibit No. 10", being a letter dated March 15, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of the City and County of San Francisco, in which Mr. Ickes acknowledged the Mayor's telegram of May 14th ("U. S. Exhibit No. 9") and stated that no formal charge had been filed to which the City must make specified response, but that communications had been received from various individuals contending that the arrangement between the City and the Company constituted a violation of the prohibitions of portions of Section 6 of the

Raker Act; and that said contention would be considered at the hearing of May 6th. The objection to said Exhibit was that it was incompetent, irrelevant, immaterial, and self-serving. Counsel for the defendant duly excepted to the ruling of the Court overruling said objection to said letter and admitting the same in evidence; said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 5. [333]

Assignment No. 6:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, "U. S. Exhibit No. 11"; being a certified copy of an Opinion rendered by Harold L. Ickes, Secretary of the Interior, on August 24, 1935, expressing the view that the contract of July 1, 1925, between the City and the Company constituted a violation of Section 6 of the Raker Act. The objection to said Exhibit was that it was incompetent, irrelevant, and self-serving. Counsel for the defendant duly excepted to the ruling of the Court, overruling the objection to said Opinion and admitting the same in evidence, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 6.

Assignment No. 7:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, without limitation, "U. S. Exhibit No. 14", being a certified copy of a letter

dated April 2, 1935, from the Secretary of the Interior to the Attorney General of the United States, requesting the commencement of the present suit. The objection to said Exhibit was that it was irrelevant, incompetent, immaterial, and self-serving, and that if admitted in evidence at all, it should be limited to the sole purpose of showing that the Secretary of the Interior had requested the Attorney General to commence the present suit. Counsel for the defendant duly excepted to the ruling of the Court, overruling said objection to said letter, and in admitting the same in evidence, and in declining to limit the effect thereof, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 7. [335]

Assignment No. 8:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question to R. B. Hansen, a witness for the defendant, who had previously testified that the City had regularly paid to the Government the annual payments required to be made by Section 7 of the Raker Act, by remitting said sums to the Secretary of the Interior, who had retained them and that the total amount so paid, including payments for the year 1937, was $330,000.00, viz.:

Q. I ask you whether you have capitalized what the payments of this semi-annually to the Government will mean to the City and County of San Francisco?

The objection to said question was that it was incompetent, irrelevant and immaterial, and had no bearing on the issues in the case.

Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 8.

Assignment No. 9:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. John J. Daily, a witness for the defendant, who had previously testified that, in June 1925, he, Mr. Nelson Eckhart, one of the Engineers of San Francisco, and Mr. Robert M. Searls, then Assisfant City Attorney of San Francisco, had had several conversations with Mr. John H. Edwards, who, at that time, was either Assistant Secretary of the Interior or Solicitor of the Department of the Interior, and in the conversations was acting on behalf of the Secretary of the Interior who had referred the matter to him, viz.:

Q. Now, will you state the substance of the conversation? [336]

The objection to said question was that it called for hearsay, that the conversation was not with a party to the cause or with anybody authorized to bind any party to the cause, that the proper foundation had not been laid, in that the identification of the party with whom the conversation was had had

not been established, nor the time of the conversation established with any particular definiteness. Cofinsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said question, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 9.

Assignment No. 10:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. John J. Dailey, a witness for the defendant, with respect to the contract of July 1, 1925, between the City and the Company, viz.:

> Q. Mr. Dailey, in the preparation of the contract between the City and County of San Francisco and the Pacific Gas and Electric Company as to the distribution of the Hetch Hetchy power, did you rely upon the ruling of the Solicitor of the Department of the Interior relative to the validity of an agency contract?

The objection to said question was that it was immaterial what Mr. Dailey relied on or what anybody else relied on, and that such matter had no bearing upon the question before the Court as to what the contract actually is. Counsel for the defendant duly excepted to said ruling of the Court sustaining said objection to said question, its ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 10.

Assignment No. 11:

That said Court erred in sustaining an objection by counsel for the [337] plaintiff to the admission in evidence of, and in refusing to admit in evidence "Defendant's Exhibit E" for identification, being a letter dated July 20, 1925, signed by C. Edward Wright, Solicitor of the Department of the Interior, addressed to the Honorable Secretary of the Interior, to which was attached a copy of the agreement of July 1, 1925, between the City and the Company ("U. S. Exhibit No. 6") and in which the writer expressed the view that the agreement of July 1, 1925, was an agency agreement and not an agreement for sale and resale of the electric energy which was the subject matter thereof. The objection to said Exhibit was that it was not a communication which was ever communicated to the defendant, and that from its date (July 20th, 1925) it obviously appeared to be a mere statement of the views of the Acting Solicitor, which were subsequently expressed in the letter of August 19, 1925, from the Secretary of the Interior to the Mayor of San Francisco, in which the Secretary stated that the acts of the City should determine whether or not it was living up to the terms of the Raker Act, a matter on which he refused to express any opinion; further, that the letter was incompetent and irrelevant, and was never proffered to or acted upon by the defendant, and that there could never have been any reliance by the defendant upon it. In connection with the offer of said Exhibit and the objection thereto, counsel for the

defendant stated that the Exhibit was offered, among other things, as a contemporaneous construction of the agreement of July 1, 1925 ("U. S. Exhibit No. 6"). Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 11.

Assignment No. 12:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in [338] evidence "Defendant's Exhibit G" for identification, consisting of a statement dated October 18, 1937, signed by the Registrar of Voters of the City and County of San Francisco, and showing the number of bond issues that have been proposed to the voters of the City for the Hetch Hetchy project, as well as the revenue bonds by which extensions could have been built, and proposed charter amendments relating to the same subject, and seven pamphlets respecting the matter, dated November 8, 1927, November 5, 1928, August 26, 1930, November 8, 1932, November 7, 1933, May 2, 1935 and March 9, 1937. The objection of counsel for the plaintiff to said Exhibit was that neither the evidence embodied therein as a whole, nor any of the items thereof singly, constituted matter that was either material or relevant to prove or disprove any allegation in the complaint or in the answer. Counsel for the

defendant duly excepted to the ruling of the Court sustaining said objection to said exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 12.

Assignment No. 13:

That said Court erred in sustaining the objection of counsel for plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit H" for identification, being a statement showing the assessment roll, constitutional debt limitation, bonded debt subject to such limitation, and the leeway for new debts of the City for the years 1924-1925 to date, as shown by the records of the City's Controller, and the leeway the City has had for each of said years, in the bonded debt, by which it might acquire a publicly owned distribution system. The objection to said exhibit was, that whether the City was or had been in a position to acquire a publicly owned distribution system, or whether it should do so was not in issue, and that the matters shown by the [339] Exhibit were incompetent, irrelevant and immaterial. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 13.

Assignment No. 14:

That said Court erred in sustaining the objection of counsel for plaintiff to the admission of, and in refusing to admit in evidence, "Defendant's Exhibit I" for identification, being a photostatic copy of Resolution 23723 (New Series) of the Board of Supervisors of the City, by which the City (prior to the execution of the contract of July 1, 1925) solicited offers by any municipality, municipal water system, or irrigation district, for the purchase of the whole or part of electric energy generated by the City in connection with its Hetch Hetchy project, delivery thereof to be made at any point on the Hetch Hetchy transmission line at the voltage and frequency mentioned in the preamble to the resolution. The objection to said Exhibit was that the matters shown thereby were incompetent, irrelevant, and immaterial, and not within the issues in the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 14.

Assignment No. 15:

That said Court erred in sustaining the objection of counsel for plaintiff to the admission in evidence of, and in refusing to admit in evidence "Defendant's Exhibit J" for identification, being

a certified copy of Resolution No. 31398 (New Series), of the Board of Super- [340] visors of the City and County of San Francisco, by which the City Engineer was directed to ascertain from the power companies operating in San Francisco, the terms upon which the total output in electrical energy from the Hetch Hetchy project could be marketed through an agency agreement, and the price at which each corporation would grant an option to the City to buy its distribution system and standby plants, and whether said corporation would be willing to sell its distribution system and standby plant to the City on a pay-as-you-go plan. In response to a request of the Court so to do, counsel for the defendant stated that the purpose of said offer was to show an attempt by the City to effect the distribution of its electric energy upon terms that would be most favorable to the City, by the acquisition of a publicly owned plant by purchase from the corporation which owned it. The objection to said Exhibit was that the matters shown thereby were irrelevant, incompetent and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 15.

Assignment No. 16:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit K" for identification, being the correspondence between the City and Pacific Gas and Electric Company and Great Western Power Company with respect to the City's solicitation of offers from said power companies pursuant to and as called for by the aforesaid Resolution ("Defendant's Exhibit J" for identification). The objection to said Exhibit was that the matters shown thereby were incompetent, irrelevant and immaterial and not within the issues of [341] the case. Counsel for the defendant duly excepted to said ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 16.

Assignment No. 17:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit L", for identification, being a certified copy of Resolution No. 21,178 (New Series), of the Board of Supervisors of the City and County of San Francisco, declaring that the City, notwithstanding its contract of July 1, 1925, with the Company, would always stand ready to serve the Modesto and Turlock Irrigation Districts

in the event said irrigation districts elected to avail themselves of the privilege of purchasing electric power from the City under the terms of the Raker Act. In connection with the offer of said Resolution, counsel for the defendant, in reply to a question from the Court inquiring the purpose of the offer, stated that Modesto Irrigation District, in response to the solicitation contained in "Defendant's Exhibit I" for identification, had replied that it might require standby service some day, and that the contract of July 1, 1925 ("U. S. Exhibit No. 6") contains a proviso that if the City is ever required to furnish power to said Irrigation District, the amount required therefor may be excepted from the contract. The objection to said Exhibit was that the matters shown thereby were incompetent, irrelevant, and immaterial, and not within the issues of the case, and, further, that said Resolution was a mere declaration of policy on the part of the City. Counsel for the defendant duly excepted to said ruling of the Court sustaining said objection to said Exhibit and refusing to accept the same in [342] evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 17.

Assignment No. 18:

That said Court erred in sustaining the objection of counsel for the plaintiff to the question (with reference to the delivery of electric energy by the City to the Company under the agreement of July

1, 1925), put to Mr. Paul J. Ost, a witness for the defendant, as follows:

> Q. How does the Hetch Hetchy load as delivered under this contract, compare with the total demand in San Francisco?

in connection with which question counsel for the defendant offered to prove by said witness that the amount of energy delivered under the agreement is less than the demand in San Francisco, and that if the agreement were terminated, (and the Hetch Hetchy electric energy thereby made unavailable for distribution), there would be insufficient electric energy available for the service of consumers in San Francisco, unless and until the Company, or some other distributing company, should construct new hydro-electric generating plants and steam generating plants and standby service. In connection with said question and the offer of proof which accompanied it, counsel for the defendant stated that he believed it to be important to show a public interest in the matter which a Court of Equity should consider in determining whether or not equitable relief should be accorded, and that the offer of proof was made upon the theory that the Court should not award injunctive relief, unless no other remedy were available, where a great detriment would result to a large number of the public. The objection to said question, and to the offer of proof made in connection therewith, was that said question and the matters embraced within

said offer, were incompetent, irrelevant and immaterial. Counsel for the defendant duly [343] excepted to the ruling of the Court sustaining said objection and rejecting said offer of proof, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 18.

Assignment No. 19:

That said Court erred in sustaining the objection of counsel for the plaintiff to a formal offer made by counsel for the defendant to prove by the witness Paul J. Ost (and in refusing to receive evidence of, the matters so formally offered to be proved by said witness) that if the amount of energy generated and delivered into San Francisco through the medium of the contract of July 1, 1925 ("U. S. Exhibit No. 6"), whether it be the identical kilowatts or an equivalent amount were, through a termination of said contract, subtracted from the total amount of energy delivered to San Francisco from all sources, such a shortage in the available power supply to the Northern part of the State of California, would be caused thereby, as would require the construction of additional power plants or additional facilities for bringing in power and would thus endanger the supply for public consumption. The objection of the plaintiff to said offer of proof and to the matters sought to be shown thereby, was that said matters were incompetent, irrelevant, immaterial, hypothetical and

based upon facts not in evidence in the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and refusing to receive said evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 19.

Assignment No. 20:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. Paul J. Ost, a witness for the defendant: [344]

> Q. What was your estimate of the cost of the city's constructing a transmission, stand-by, and distribution system adequate to supply the Hetch Hetchy energy to its people and to furnish the necessary stand-by and supplemental system?

The objection to said question was that it was incompetent, irrelevant, and immaterial, and that the only point in the case was that the City had not fulfilled its obligations under the Raker Act. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said question, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 20.

Assignment No. 21:

That said Court erred in sustaining the objection of counsel for the plaintiff to a formal offer of proof

made by counsel for the defendant to prove (and in refusing to receive evidence of the facts so offered to be proved) that it would cost in excess of $60,000,000.00 for the City to build and install its own transmission, step-down, distribution, and standby service and in refusing to receive evidence of said facts. The objection to said offer and to said evidence was that they were incompetent, irrelevant and immaterial and not within the issues of the case. Counsel for the defendant duly excepted to said ruling of the Court rejecting said offer of proof and refusing to receive said evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 21.

Assignment No. 22:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question, put to Mr. Paul J. Ost, a witness for the defendant:

[345]

Q. What would be the cost of a necessary stand-by system plant for San Francisco if the City were to transmit and distribute only the energy produced at the Moccasin plant without reference to any steam supplemental plant?

The objection to said question was that it was incompetent, irrelevant, and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court, sustaining said objection to said question, said ruling and the

defendant's exception thereto being designated in the record herein as Ruling and Exception No. 22.

Assignment No. 23:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. Paul J. Ost, a witness for the defendant:

> Q. At what period of time was it definitely determined to pierce the Coast Range Mountains by tunnel and bring the water into the City and County of San Francisco by gravity head instead of pumping it over the Coast Range?

Counsel for the defendant stated that said question was asked to show that a change in the conditions existing when the Raker Act was enacted had occurred; that, at the time of the enactment of the Act, it had been the plan of the City to pump the water over the Coast Range Mountains and to use the power generated in the Hetch Hetchy project for that purpose, but that later, various core borings and test shafts proved that it was possible to penetrate that particular formation with tunnels, and it was then decided that the water should be drawn to San Francisco by gravity by tunnels through the Coast Range Mountains.

Further, in response to a question from the Court, counsel for the defendant stated that the change in plan was made long prior to 1925, [346] but sub-

sequent to the enactment of the Raker Act, and that, as a result of the change, the surplus power available for distribution in San Francisco was enormously greater than was contemplated at the time the Act was passed; that, in his opinion, the question was justified by the cases which hold that evidence is admissible to show a change in conditions occurring after the making of a grant containing covenants restricting the utilization of the granted property. The objections to said question and to the offer of proof in connection therewith was that the facts sought to be shown were incompetent, irrelevant and immaterial, and not within the issues in the case and would merely tend to show that it was more convenient for San Francisco to change its plan and sell the power generated in connection with the Hetch Hetchy project than to conform to the Raker Act.

Counsel for the defendant duly excepted to the ruling of the Court sustaining the objection to said question and rejecting the offer of proof made in connection therewith, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 23.

Assignment No. 24.

That said court erred in sustaining the objection of counsel for the plaintiff to a formal offer by counsel for the defendant, to prove (and in refusing to receive evidence of the facts so offered to be proved) that, at the time the Hetch Hetchy grant was made,

and for many years prior thereto, it had been the plan of the Engineering Department of the City and County of San Francisco to pump Hetch Hetchy water over the Coast Range Mountains and, in so doing, to utilize the greater part of electric energy which might be developed in that project; that some three years after the enactment of the Raker Act, it was ascertained, through the drilling of core holes and the sinking of test shafts that [347] it would be physically possible and practical to tunnel the Coast Range Mountains, and that, when that fact was ascertained, it was determined to tunnel the range and to bring the water to San Francisco by gravity, and that, as a result of the change in plan, an enormously greater amount of electric energy was made available for disposition by the City than was contemplated at the time the Raker Act was passed. In connection with said offer of proof, counsel for the plaintiff stated that the state of facts before Congress at the time of the enactment of the Raker Act was later changed; that the facts offered to be proved would show, first, the state of facts as they existed at the time the Raker Act was passed, and would assist the Court in interpreting the language of Section 6 of the Raker Act and in determining the intention of Congress in using that language, and would show, second, the changed conditions occurring subsequent to the enactment of the Raker Act, which should affect the relief which the Court might grant. The objection to said offer

of proof and to the facts sought to be proved, was that they were incompetent, irrelevant, immaterial, and not within the issues of the case, and that the fact that the City had changed its plans after the enactment of the Raker Act was not material at all on the question of whether or not, in the sale of power, it was violating Section 6 of the Raker Act. Counsel for the defendant duly excepted to the ruling of the Court rejecting said offer of proof and refusing to receive the evidence contemplated thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 24.

Assignment No. 25,

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. N. Randall Ellis, a witness for the defendant, with respect to the figure 73.3% (which, [348] he had previously testified, was the percentage of the total moneys collected by the Company from consumers in San Francisco for electric energy, which is allocated to the Company under the agreement of July 1, 1925 ["U. S. Exhibit No. 6"] to cover general administration expenses, distribution cost, stand-by and peak load expense and transmission expense):

Q. In your opinion, at that time did that figure represent the actual expense of the Pacific Gas & Electric Company in distributing electrical energy, received by it at Newark, to

consumers in San Francisco, including a reasonable return on the capital required for that purpose?

A. Yes.

The objection to said question was that it was incompetent, irrelevant and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said question, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 25.

Assignment No. 26:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, Decision No. 22147 of the Railroad Commission of California, entitled: "In the Matter of the Application of the City and County of San Francisco, a municipal corporation, that the Railroad Commission of California Fix and Determine the Just Compensation to be paid by the City and County of San Francisco", etc., and to application No. 9767, in response to which said Decision was rendered, by which application said Railroad Commission was requested to fix and determine the just compensation to be paid by the City for certain parts and portions of the electric generating transmission and distribution properties of Great West-

ern Power Company. In connection with the offer of [349] said Decision and Application, counsel for the defendant offered to prove thereby that, in the rate proceedings of said Great Western Power Company, which were instituted on February 11, 1924, the value of the properties of said Company was fixed by said Railroad Commission at the sum of $11,815,000.00; that in the year 1930 a bond issue was submitted to the people of San Francisco to purchase the properties of said Great Western Power Company at $18,945,000.00, and counsel for the defendant further stated that he would explain by the witness the discrepancy between said latter amount and the amount of $11,815,000.00 fixed by the Railroad Commission as the value of said properties. Counsel for the defendant further stated, in connection with said offer, that the evidence was offered to show that the City officially did everything within its power to comply with and fulfill the terms of the Raker Act. The objection to said Decision and Application and the offer of proof made in connection with them was that the evidence was not admissible under any theory; was incompetent, irrelevant and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and declining to receive said Application and Decision in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 26.

Assignment No. 27:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, Decision 21248 of the Railroad Commission of the State of California, entitled: "In the Matter of the Application of the City and County of San Francisco, a municipal corporation, that the Railroad Commission of the State of California Fix and Determine the Just Compensation to be paid by the City and County of San Francisco for certain [350] parts and portions of the electric generating, transmission and distribution properties of the Pacific Gas & Electric Company, a corporation", which Decision and the Decision (No. 22147) previously referred to, are found in Vol. 33 of the Opinions and Orders of the Railroad Commission of California. In connection with the offer of said Decision (No. 21248) counsel for the defendant offered to prove that it fixed the value of the properties of Pacific Gas & Electric Company as of June, 1929, at $26,880,000.00; that "Defendant's Exhibit G" for identification, previously offered, shows that on August 26, 1930, a bond issue was submitted to the people of the City for the purpose of acquiring certain properties of said Pacific Gas & Electric Company for the sum of $44,600,000.00, and defendant's counsel stated that he desired the witness to explain the difference between said last mentioned figure and the figure of $26,880,000.00, fixed by said Decision of the Railroad Commission,

as the value of the properties of said Pacific Gas & Electric Company. The objection of counsel for the plaintiff to said Decision and to the offer of proof made in connection therewith, was that the facts shown to be proved were incompetent, irrelevant and immaterial, and not within the issues of the case, and further that the Court had previously ruled that evidence with respect to the bond issues was not admissible. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection, and refusing to receive in evidence said Decision and the matters sought to be proved in connection therewith, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 27.

Assignment No. 28:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence "Defendant's Exhibit O" for identification, being a [351] statement prepared by Mr. William H. Nanry, a witness for the defendant, showing the bonds which had been authorized and sold by the City and County of San Francisco for governmental purposes between 1924-5 and 1937, and showing the changes in the City's bonding capacity resulting therefrom, and the legal impossibility of the City to vote bonds sufficient to cover the cost of a municipally owned distribution system. The objection to said Exhibit was that the facts shown thereby

were incompetent, irrelevant and immaterial, and that the financial ability of San Francisco to comply with the provisions of the Raker Act was no justification for the sale of power contrary to the terms of Section 6 of said Act. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 28.

Assignment No. 29:

That said Court erred in sustaining the objection of counsel for the plaintiff to a formal offer made by counsel for the defendant to prove by the witness William H. Nanry (and in refusing to receive evidence of the facts so offered to be proved) that, during the period June 1929 to 1937, particularly because of the depression, the burden cast upon the bonded debt leeway of San Francisco, through the operation of the law limiting bonded indebtedness, had been greatly increased, and the leeway diminished, because of the necessity of providing a large sum of money for relief and large sums of money for sewers, schools, streets, and other purposes which, in normal times, would be taken care of through the annual tax levy, but, which, by reason of the severe depression, had to be capitalized in order that the services mentioned could be rendered, and the relief afforded, to the people of San Francisco. The objection of counsel for the plaintiff to the facts so [352] sought to be proved was

that they were incompetent, irrelevant, and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and refusing to receive evidence of said facts, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 29.

Assignment No. 30:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit P" for identification, being a certified copy of a record of water appropriations made by San Francisco, and other persons on behalf of San Francisco who have assigned those rights to San Francisco, and showing particularly the various water rights which the City had acquired on the Tuolumne River, Lake Eleanor and Cherry River and the tributaries of both rivers and the lake. In connection with said offer counsel for the defendant stated that the Exhibit would show that the water rights used by the City in the development of electric energy involved in this suit were acquired and owned by the City under and by virtue of the laws of the State of California, and were not acquired through any grant from the Federal Government. The objection to said Exhibit and to the facts sought to be shown thereby was that it and they were incompetent, irrelevant and

immaterial, and not within the issues of the case, and that the Court was not concerned with the identity of the owner of the water rights. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and refusing to receive in evidence said Exhibit and the facts sought to be proved thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 30. [353]

Assignment No. 31:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit P" for identification, being a record of the water rights used by the City on the Hetch Hetchy project, in connection with which counsel for the defendant stated that said Exhibit would show that the water used for the development of the Hetch Hetchy electric power which was being distributed by the Company under the provisions of the contract of July 1, 1925, as being developed through the exercise of water rights owned by the City, and not acquired from the United States. The objection to said Exhibit and to the facts sought to be shown thereby was that it and they were incompetent, irrelevant and immaterial, and not within the issues of the case, and that the ownership or non-ownership of said water rights by the City was not involved in the case. Counsel for the defendant duly excepted

to the ruling of the Court sustaining said objection and in refusing to receive in evidence said Exhibit and the facts sought to be proved thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 31.

Assignment No. 32:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit Q" for identification, being a record of assignments made to the City by various appropriators of the water rights which are mentioned in "Defendant's Exhibit P" for identification. The objection of the counsel for plaintiff to said evidence and said offer was that it was incompetent, irrelevant and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and re- [354] fusing to receive in evidence said Exhibit and the facts shown thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 32.

Assignment No. 33:

That said Court erred in granting the motion of counsel for the plaintiff to strike out various portions of the evidence previously admitted by the Court, subject to a motion to strike out, which motion was granted by order of the Court made April

11, 1938. The portions of the evidence so stricken out by said order were the following:

(a) The following testimony of Joseph James Phillips, a witness for the defendant:

Q. What was the value of those parcels (referring to the parcels of land conveyed by the United States to the defendant pursuant to the terms of the Raker Act)?

A. $244,139.45.

Q. Do you know the total acreage and the value (of the lands conveyed by the defendant to the United States)?

A. The acreage was 1698.36 and the value $74,409.00.

Q. As purchasing agent for the project, and acquiring it, did you acquire any water rights from the United States Government?

A. No.

Q. Are you familiar with the so-called Ham Hall purchase made by the City and County of San Francisco?

A. Yes.

Q. How was it made?

A. $1,052,000.

Q. That includes the water rights and the lands, does it, Mr. Phillips?

A. Water rights and lands and development work, buildings, and various other items.

Q. Where is it located, for the information of the Court?

A. Cherry and Lake Eleanor.

Q. Indicate it on Exhibit A for the information of his Honor.

A. There are three watersheds involved in the Hetch Hetchy project. One is named Hetch Hetchy Valley, and the other two in the watershed are Lake Eleanor and the watershed of Cherry River. Ham Hall purchased the land, buildings, development work, surveying and other work in these watersheds of Lake Eleanor and Cherry.

Q. Have you stated all the value of the lands that were obtained from the Government on this project?

A. Yes.

Q. Repeat them, please.

A. $244,139.45.

Q. Have you the figures of what it cost the City and County of San Francisco to purchase the area that is indicated in red at the Moccasin Power Plant on Defendant's Exhibit A?

A. I have not the itemized figures here of the various properties. What I have is my valuation of real property owned by the City and County of San Francisco which under the charter it is my duty to prepare every year.

Q. You mean in connection with this project?

A. All properties owned by the City, and in this book is everything in connection with the Hetch Hetchy project.

Q. Would you kindly relate what the properties are that are used in connection with the Hetch Hetchy project, and their value?

A. I have before me a report showing—do you want the property as well as the price?

Q. Yes, I certainly do.

A. Tuolumne County there is a reservoir land, rights of way, reservoir land, aqueduct, power plant, regulating reservoir, rights of way, electric transmission lines and rights of way, Hetch Hetchy railroad land and rights of way. In further toward the city I have railroad land, aqueduct and electric transmission line, with a total of $2,372,514. Those are the actual figures taken from the deeds.

Q. That likewise, is the amount of money that the City and County of San Francisco paid for aqueduct, tunnels rights of way parcels of land that were required to be acquired in fee, and, in short, the entire value of the real property involved or the easements in the Hetch Hetchy project?

A. Yes.

(b) The following testimony of R. B. Hansen, a witness for the defendant: [355]

Q. Referring to Section 9(p) of the Raker Act, that the grantee shall construct a trail on the north side of the Hetch Hetchy reservoir site, and leading from said trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill

Meadow, do you know the amount of money that the City and County of San Francisco expended, if any, in the carrying out of the obligations under that section of the Act?

A. I have taken from our office records the actual cost to the city of those trails as $82,670.04.

Q. In addition to that, in lieu of the building of the trails on the north side of the valley, and constructing the road from Hetch Hetchy to all those valleys were certain amounts paid to the United States Government and accepted by the Secretary of the Interior in or about the year 1930?

A. They were. There were five payments made by the City and County of San Francisco to the United States Government, a payment of $250,000 in each of the five years, 1932 to 1936, inclusive. This gives a total of $1,250,000.

Q. The program to which you have testified which cost $1,250,000 was the program which was subsequently approved by the Board of Supervisors and followed out, was it not?

A. Yes.

Q. Now, in addition to this expenditure, did the city expend any money in the grading and construction of the present highway leading from Mather in to the Hetch Hetchy Valley, a distance of 19 miles, I think?

A. The city paid for the entire cost of this road, the total cost to the city being $353,500.91.

Q. Has that road been conveyed to the United States Government?

A. Yes, it is being used by the public.

Q. Did the City construct a road, a wagon road, from Hetch Hetchy Lake to Lake Eleanor?

A. The City constructed a wagon road leading from Hetch Hetchy Reservoir to Lake Eleanor, at the cost of about $75,000.

Q. Is that road available for public use under safety restrictions?

A. Yes.

Q. Did the City also reimburse the Tuolumne Water Supply Company for sums expended by that company from 1902 to 1911 in constructing roads and trails to the Stanislaus National Forest which have later been made available to the Government and the public?

A. The City reimbursed the Tuolumne Water Supply Company to the extent of $85,000, covering work on roads [356] and trails that had already been done by this company during the period from 1902 to 1911.

Q. What was the total of the figures which you have given as to the roads and trails constructed by the City and County of San Francisco in the National Park, or for which money was furnished either to the Government or to its predecessor in interest when the trails were later turned over to the Government?

A. This total expenditure adds up to be $1,846,170.95.

Q. Under the provisions of Section 9(t) of the Raker Act, the grantee is required to convey to the United States a good and sufficient title to any and all tracts of land which are now owned and not actually required for use under the provisions of this Act. Did the City expend any money in order to comply with the terms of that provision of the Act?

A. The city returned to the Government 1698.36 acres which they had bought from private parties previously.

Q. Have you the values at which these lands have been appraised, or are they combined with the purchase of water rights and other things?

A. We have appraised those at approximately $100 an acre, which gives an appraised value of $169,836.

Q. Under the terms of Section 7 of the Raker Act the City and County of San Francisco is required to pay annually to the United States sums commencing with $15,000 and at the end of ten years running up to $30,000. Have those payments been regularly made by the City?

A. They have been regularly made by the city to the United States Government.

Q. And accepted by the United States Government?

A. Yes.

Q. Those sums are remitted to the Secretary of the Interior, are they not?

A. Yes.

Q. What is the total of those sums to date including the year 1937?

A. The total including the year 1937 is $330,000.

Q. Have you apportioned the proper overhead expense of engineering and administration relating to the maintenance of trails and roads, not included in the above estimate? I am referring now only to roads and trails which are conveyed to the Government or made subject to the Government's use.

A. Yes. The cost of engineering and administra- [357] tion and overhead expense and maintenance of roads and trails has been estimated at 10 per cent.

Q. If you add those last figures to your total paid originally for the roads and trails you get a grand total of $2,702,607, do you not?

A. Yes, that is correct.

(c) A letter dated May 18, 1928, from Hubert Work, Secretary of the Interior, to the City and County of San Francisco, previously admitted in evidence and marked "Defendant's Exhibit C".

(d) The following testimony of Willis O'Brien, a witness for the defendant:

Q. What was the total amount of the bond issue voted for this project?

A. $89,600,000.

Q. In the exhibit referred to (i.e., "Defendant's Exhibit F") it is set out year by year as to when the bonds were voted, the rates of interest, and what else does it show, briefly?

A. As to the years that they were voted, that is not shown, but the date of the bonds are shown, for example, the bonds of the 1909 issue, January 1, 1910 issue July 1. The elections authorizing these, of course, were held some time before.

Q. It also shows, does it, what the bonded debt limit of San Francisco was on July 1, 1925?

A. It does.

Q. What is that, in your Exhibit?

A. The limit for future issues after sale of all currently authorized bonds was $12,732,588.

Q. Directing your attention to the last page of this exhibit, just explain to his Honor what that page purports to show.

A. You have reference to the bond interest?

Q. Yes.

A. That schedule shows the total bond interest to June 30, 1937 with the detail there as to the issues.

Q. What is the total interest that has been paid?

A. The grand total of interest is $41,021,874.01. [358]

(e) A three-page document dated July 1, 1925, entitled "Bonded Debt Limit", prepared by the

witness Willis O'Brien, and countersigned by Harold J. Boyd, Controller of the City and County of San Francisco, showing the Bonded Debt Limit of said City and County; this document had previously been admitted in evidence and marked "Defendant's Exhibit F".

(f) The following testimony of William H. Nanry, a witness for the defendant:

Q. Mr. Nanry, assuming that the income from the hydro-electric energy marketed through the contract in question has averaged something in excess of $2,200,000 annually per year, can you state what the net effect upon the taxpayers of San Francisco would be if there was a cancellation of this contract and that income were cut off?

A. If that income would not be available from the agency agreement it would have to be made up by taxation and would require an increase of about 28 cents in the tax rate.

Q. 25 cents per hundred dollars?

A. Per hundred dollars of assessed valuation.

Q. Is that statement based upon the present assessment roll of San Francisco?

A. Current assessment roll of the City.

Counsel for the defendant duly excepted to the ruling of the Court striking out the above mentioned portions of the evidence in said cause, said ruling and the defendant's exception thereto being desig-

nated in the record herein as Ruling and Exception No. 33.

Assignment No. 34:

That said Court erred in its Order made April 11, 1938, by which it denied the motion of counsel for defendant (made prior to the conclusion of the hearing of said cause), to reopen said cause and to receive the evidence theretofore offered by said defendant upon the trial of said cause, to which the Court had theretofore sustained ob- [359] jections of counsel for the plaintiff. Counsel for the defendant duly excepted to the ruling of said Court embodied in said last mentioned Order, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 34.

Assignment No. 35:

That said Court erred in refusing to grant the motion of counsel for the defendant to require the plaintiff to and in failing to require counsel for the plaintiff to specify seriatim and severally (a) the provisions in the contract of July 1, 1925, made by The City and County of San Francisco with the Pacific Gas and Electric Company for the distribution of municipal electric energy ("Exhibit A" to the Answer of the Defendant filed herein July 20, 1937, and United States "Exhibit 6" at the Final Hearing), upon which the Plaintiff relies to establish that said contract is not an agency contract, but a contract of sale, and to specify (b) which of those

provisions the Plaintiff claims (1) show or tend to show that the parties to said contract did not intend to make an agency contract but a contract of sale, or (2) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties), (a) are legally inconsistent with the idea of an agency; (b) make it impossible, as matter of law, for the contract to be one of agency, and/or (c) convert, by operation of law, what was or may have been intended as a contract of agency into a contract of sale.

Counsel for the defendant duly excepted to the ruling of the Court denying its said motion, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 35. [360]

Assignment No. 36:

That said Court erred in refusing to grant the motion of counsel for defendant that in its decision it deal specifically with, and in failing, in its decision, to deal specifically with, each of the said contentions of and as made by the plaintiff aforesaid, and declare which of the said contentions, in the judgment of the Court, are sound and which are unsound; and in and by its said decision, and in advance of any findings of fact to be made herein, furthermore, and independently of said contentions, specify severally the provisions in the aforesaid

contract, if any there be, which, in the opinion of the Court, (a) establish or tend to establish that said contract is not an agency contract, but a contract of sale, (b) show or tend to show that the parties to the contract did not intend to make any agency contract, but intended to make a contract of sale, (c) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties) (1) are legally inconsistent with the idea of an agency; (2) make it impossible, as matter of law, for the contract to be one of agency and/or (3) convert, by operation of law, what was or may have been intended as a contract of agency into a contract of sale.

Counsel for the defendant duly excepted to the ruling of the Court refusing to grant the motion last specified, and in failing in its decision to deal specifically with the matters mentioned in said motion, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 36.

Assignment No. 37:

That said Court erred in its ruling by which it denied, and refused to find in accordance with the request contained in paragraph Numbered 3 of defendant's proposed amendments to Plaintiff's proposed "Findings [361] of Fact and Conclusions

of Law" in said cause, which said request read as follows:

"3. On page 3, line 7 of said proposed Findings, after the word 'generated', insert the following:

'The location and extent of the lands and rights of way so granted to defendant under said Raker Act are correctly shown on "Defendant's Exhibit A" in evidence herein.'"

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 37.

Assignment No. 38:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 4 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"4. On page 3, lines 15-16 of said proposed Findings, strike out the words: 'and acquiesced in, and became bound by the terms and conditions thereof'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 38.

Assignment No. 39:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 5 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"5. Page 3, lines 19 to 22, of said proposed Findings, strike out the words:

'To insure the direct distribution of water [362] and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant.'

and commence the following word 'it' with a capital."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 39.

Assignment No. 40:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 6 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"6. On page 3, line 27 of said proposed Findings, after Finding 'IV' insert the following:

'IV A

Among the provisions of said Raker Act were the following appearing in Section 9 thereof:

"(1) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also the the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping sub-surface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated and which may be so beneficially used by said irrigation districts or muincipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, [363]

That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping sub-surface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy as follows: The said grantee shall within three years from the date of the completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser develop-

ment. The said grantee shall develop and use hydro-electric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale,

such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to [364] carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times

conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.' '"

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 40.

Assignment No. 41:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 7 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"7. On page 4, line 1 of said proposed Findings, add the following:

'in connection with the utilization of lands,

rights and privileges owned by the City and acquired by it from other sources'." [365]

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 41.

Assignment No. 42:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 11 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"11. On page 4, line 9 of said proposed Findings, insert a new paragraph to be numbered 'VI A' which shall read as follows:

'VI A

In conformity with the provisions of said Raker Act, and prior to July 1, 1925, the defendant had expended over $45,000,000.00 in the construction of dams, aqueducts, and works, designed to store and deliver a municipal water supply to its inhabitants, had built the Early Intake power house, primarily for the supply of power for construction purposes on the project, and had completed the Moccasin power house capable of generating 80,000 horsepower of hydroelectric energy, and a transmission line adequate to trans-

mit said energy to Newark in Alameda County; the defendant had not acquired and never has been financially able to acquire any distribution system in the City and County of San Francisco or elsewhere for the distribution of such electric energy to consumers; the Company and Great Western Power Company (later consolidated with the Company) were at that time the only distributing companies owning electric distribution systems in San Francisco, and each of them declined to sell or lease its distribution system to the defendant for the purpose of enabling it to distribute thereby to its inhabitants the electric energy generated by it in connection with its said Hetch Hetchy project.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 42. [366]

Assignment No. 43:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 12 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"12. On page 4, line 25 of said proposed Findings, after the words 'United States', insert the following:

'in connection with lands, water rights, easements and privileges owned by the City and acquired by it from other sources,' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 43.

Assignment No. 44:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 13 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law", in said cause, which said request read as follows:

"13. On page 4, line 28 of said proposed Findings, after the figures '1925' insert the following:

'There never has been and there is not any contract or arrangement between the City and the Company with respect to the delivery and/or distribution of said electric energy, other than said contract of July 1, 1925.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 44. [367]

Assignment No. 45:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 14 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"14. On page 4, line 29 of said proposed Findings, after the words: 'Hetch Hetchy' insert the following:

'About 3 per cent. of the energy so generated and transmitted is produced in a power plant known as the Early Intake power plant, which is situate on lands granted to the City under the terms of said Raker Act; that the remaining 97 per cent. of said energy is generated in the Moccasin Creek power plant, which is situated entirely on patented land owned by the City, and that the electric energy generated therein, together with the surplus energy from the Early Intake plant, is transmitted from Moccasin power plant to Newark in Alameda County, over lands owned by the City and not acquired by it under the terms of the Raker Act; the only use made by the City of rights granted to it under the Raker Act in connection with said Moccasin Creek plant is the storage of water in the Hetch Hetchy Valley and at Lake Eleanor, partially on lands granted under the Raker Act, and the transmission of said

water through tunnel aqueducts and canals partially on lands granted under the Raker Act; the primary purpose of said reservoirs and aqueducts is to transmit water to San Francisco for municipal water supply purposes; said water would be so transmitted whether the Moccasin Creek power plant, which is on the line of the water conduit, were operated or not.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 45.

Assignment No. 46:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 15 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read [368] as follows:

"15. On page 5, strike out lines 3 and 4 of said proposed Findings, and in lieu thereof insert the following:

'In carrying out said contract of July 1, 1925, the City and the Company have proceeded as follows:' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's ex-

ception thereto being designated in the record herein as Ruling and Exception No. 46.

Assignment No. 47:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 16 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "16. On page 5, line 7 of said proposed Findings, insert before the word 'Determination' the words: 'Subject to the provisions of said contract,' and change the 'D' in 'Determination' to a small letter."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 47.

Assignment No. 48:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 17 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "17. On page 5, line 14 of said proposed Findings, insert after the word 'disposition', the words: [369]

'but in a physical sense only and subject to the provisions of said contract of July 1, 1925' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 48.

Assignment No. 49:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 18 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"18. On page 5, line 16 of said proposed Findings, strike out the words: 'it is provided that from' and in lieu thereof insert the words: 'the parties to said contract deducted' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 49.

Assignment No. 50:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 19 of Defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of

Law" in said cause, which said request read as follows:

"19. On page 5, lines 17 and 18 of said proposed Findings, strike out the words: 'shall be deducted' and in lieu thereof insert the word: 'thereof'".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 50. [370]

Assignment No. 51:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 21 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"21. On page 5, lines 21 to 25 of said proposed Findings, strike out the sentence commencing with the words: 'Deduction of 24 per cent' and ending with the words: 'for such energy'".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 51.

Assignment No. 52:

That said Court erred in its ruling by which it denied and refused to find in accordance with the

request contained in paragraph numbered 22 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "22. On page 6, line 14 of said proposed Findings, strike out the words: 'under the contract', and insert the word 'exact' at the end of said line."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 52.

Assignment No. 53:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 23 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request, read [371] as follows:

> "23. On page 6, line 16 of said proposed Findings, after the word: 'consumers' insert the following:
>
> 'to the extent that payments made to the City are computed in accordance with the formula prescribed in said contract, and have not taken into account changes made by the Railroad Commission of California in each

of the years 1935, 1936 and 1937, in respect of the rates chargeable to consumers' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 53.

Assignment No. 54:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 24 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"24. On page 6, between lines 16 and 17 of said proposed Findings, insert three new paragraphs to be numbered '3a', '3b' and '3c', which shall read as follows:

'3a. In and by said contract of July 1, 1925, it is provided that the rates at which the electric energy delivered by the City to the Company under said contract shall be sold to consumers in the City and County of San Francisco, shall be those fixed by the Railroad Commission of the State of California; said rates are the rates which at all times since July 1, 1925 have been and are now operative and binding upon the Company with respect to all electric energy generated by it which it sells in said City and

County of San Francisco; said rates were adopted by the City and the Company in and by said contract of July 1, 1925, as the rates which should be charged to consumers of the electric energy generated by the City and delivered by it to the Company for transmission and distribution, as provided in said contract, for the reason that it would be impractical to charge consumers of electric energy generated by the Company, at one rate, and to charge consumers of the electric energy generated by the City at a different rate; [372]

3b. Since the execution of said contract of July 1, 1925, the City has received and is still receiving for the electric energy delivered by it to the Company the percentage of the average rate paid to the Company by consumers in the City and County of San Francisco, which in and by said contract it is provided that it shall receive; said average rate as fixed by said contract has remained constant, however, and has not been varied to conform to the rates fixed by the Railroad Commission of California in the years since the execution of said contract; as the result of the failure to vary said average rate of return to conform to the rates fixed by said Railroad Commission, the City has received from the Company $25,000.00 more than it would have received if said return had varied

in conformity with the rates fixed by said Railroad Commission as by said contract it is provided that said return should vary;

3c. The net revenue to the City from the disposition and distribution of the electric energy generated by it, in accordance with the aforesaid contract of July 1, 1925, between the City and the Company, is and at all times has been approximately $2,200,000.00 per year.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 54.

Assignment No. 55:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 25 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"25. On page 6, lines 25 to 28, inclusive, of said proposed Findings, strike out the sentence commencing with the words: 'The City is assured' and ending with the words: 'its acceptance or use' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's

exception thereto being designated in the record herein as Ruling and Exception No. 55. [273]

Assignment No. 56:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 26 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "26. On page 6, lines 30 and 31 of said proposed Findings, after the words: 'are fixed', strike out the words: 'not by the City but by the State Railroad Commission', and in lieu thereof insert the following:
>
> 'not by the Railroad Commission of California, but by the City, which, however, adopts the rates prescribed by said Railroad Commission of California, as the rates which may be charged by private utility corporations to consumers of electric energy' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 56.

Assignment No. 57:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 27 of

defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"27. On page 7, lines 4 to 6 of said proposed Findings, strike out all of the paragraph numbered 6 and in lieu thereof insert the following:

'6. Electric energy originating at Hetch Hetchy is distributed by the Company, in the normal course of its business, to the persons, firms and corporations who, are customers therefor at the time of distribution'".

Counsel for the defendant duly excepted to said ruling of the [374] Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 57.

Assignment No. 58:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 28 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"28. On page 7, lines 14 to 17 of said proposed Findings, strike out all of paragraph '9' and in lieu thereof insert the following:

'Except as next stated, the Company makes no accounting to the City of its sales of elec-

tricity to consumers. The amount of electricity delivered to the Company by the City at Newark is determined by joint meter readings at Newark, and the formulae specified in the contract of July 1, 1925, are applied to said quantity and the City merely bills the Company for said quantity in accordance with said formulae' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 58.

Assignment No. 59:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 29 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"29. On page 7, lines 21 and 22 of said proposed Findings, strike out the words: 'for sale of Hetch Hetchy power to the Company by the City', and in lieu thereof insert the following:

[375]

'of July 1, 1925. The power so purchased by the City from the Company, however, has different characteristics from that delivered by the City to the Company at Newark; after receiving the energy at Newark the Com-

pany steps down the voltage of said energy and regulates it through transformers and condensors; for municipal railway use, it converts a large part of the current from alternating current with a 60 cycle frequency to direct current having no frequency, radically changes the load factor, and, by its standby service, protects the City's requirements for electric energy for the various purposes for which it is used by the City' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 59.

Assignment No. 60:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 31 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"31. On page 7 of said proposed Findings, strike out all of paragraph 'X' from the 'Findings of Fact', because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the 'Conclusions of Law', if the subject matter is to be, at all, included in the 'Findings of Fact and Conclusions of Law', in said cause."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 60.

Assignment No. 61:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered [376] 34 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "34. On page 9 of said proposed Findings, strike out the figure 'XIII' and all of the paragraph of that number, and in lieu thereof insert the following:
>
> 'XI.
>
> Unless restrained by this Court, the City will continue to dispose of the electric energy generated by it at Hetch Hetchy in the manner hereinbefore stated.'"

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 61.

Assignment No. 62:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 35 of

defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"35. On page 9, line 10 of said proposed Findings, insert four new paragraphs to be numbered 'XII', 'XIII', 'XIV' and 'XV', which shall read, respectively, as follows:

'XII.

The manner of disposition and distribution by the City of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with the aforesaid contract of July 1, 1925, ("United States Exhibit 6"), has not, at any time, damaged, and does not damage, the plaintiff in any respect or to any extent or in any amount;

XIII.

If the City shall be prevented from disposing of the electric energy generated by it in connection with its Hetch Hetchy project, as provided in said [377] contract of July 1, 1925 ("United States Exhibit 6"), or in some other manner by which it shall be permitted to use the transmission and distribution facilities of a private corporation for such purpose, it will suffer a loss of approximately $2,200,000.00 per year and will be damaged in that amount and to that extent.

XIV.

Any sudden disruption of operations under said contract of July 1, 1925 ("United States Exhibit 6") or any sudden cessation of the disposal and distribution of the electric energy generated by the City at its above mentioned power plants in connection with the so-called Hetch Hetchy water project, in the manner provided in said contract, would result in serious economic waste; for said reason, the City should be allowed a reasonable period within which to provide a mode of disposing of and distributing said electric energy, which will not violate the provisions of the Raker Act; a reasonable period to allow the City for said purpose is one year, to commence on the day when the decree herein shall become final; the injunction to be issued herein should not be issued prior to the expiration of said period.

XV.

It is appropriate that the Court reserve jurisdiction of the cause for the purpose of modifying its Decree to be entered herein, so as to permit the City to transmit and distribute the electric energy generated by it in connection with its said Hetch Hetchy project, either by contract with a private corporation, or otherwise, in a manner which will not constitute a violation of the Raker Act'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 62.

Assignment No. 63:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 36. of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "36. On page 9, lines 18 to 22, inclusive, of said [378] proposed Findings, strike out the first of the 'Conclusions of Law' and in lieu thereof insert the following:
>
> 'The contract of July 1, 1925 is a contract to sell for resale the electric energy generated by the City at Hetch Hetchy; said contract contemplates a sale of electric energy thereunder, includes a sale to the Company by the City of the right to resell the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark; said contract is prohibited by and is in violation of the provisions of the Raker Act prohibiting such sale'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 63.

Assignment No. 64:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 37 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "37. On page 9, strike out the second of the 'Conclusions of Law' and in lieu thereof insert the following:
>
> 'The contract between the City and the Company is a grant by the City to the Company of the right to sell the electric energy generated by the City at Hetch Hetchy and is a selling to the Company of the right to sell said electric energy in violation of the prohibition of Section 6 of the Raker Act'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 64.

Assignment No. 65:

That said Court erred in its ruling by which it denied and refused [379] to find in accordance with the request contained in paragraph 39 defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"39. On page 10, line 19, before the words: 'United States', insert the following:

'Subject to the provisions of the next succeeding paragraph "VI" hereof,' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 65.

Assignment No. 66:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 40 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"40. On page 10, line 28, insert the following:

"The United States is entitled to a decree which shall order, adjudge and decree as follows:

(1) That one (1) year after this Decree shall have become final, either through the lapse of the time limited for an appeal therefrom without any appeal having been taken, or through the affirmance by the Court, which shall have finally disposed of any appeal taken therefrom, the Clerk of this Court issue out of this Court and under the seal thereof, a Writ of Injunction directed to the defend-

ant and enjoining and restraining it from distributing or otherwise disposing of the electric energy generated by it at Moccasin Creek Power House and/or Early Intake Power House in connection or in conjunction with its so-called Hetch Hetchy Water Project, in the manner provided in said contract of July 1, 1925, ("United States Exhibit 6"), and directing that unless it shall cease from distributing or otherwise disposing of said electric energy in the manner provided in said last mentioned contract, it be enjoined and restrained from using for the generation and transmission of said electric energy, any of the [380] rights granted to it in and by the Statute of the United States, approved December 19, 1913 (38 Stats. at L. 241) commonly known as and called the Raker Act.

(2) That each of the parties hereto bear and pay its costs of suit herein.

(3) That the defendant shall have the right to submit to the Court at any time any plan, contract or arrangement for the transmission, distribution and disposal of the electric energy generated by it in connection with its Hetch Hetchy project which, in its opinion, does not constitute a violation of the provisions of said Raker Act, and to apply to the Court at the foot of the decree for a modification of said decree and of the injunction thereby directed to issue, which

will permit it to transmit, distribute and dispose of said electric energy in accordance with such plan, contract or arrangement, and the Court hereby retains jurisdiction of the cause for the purpose of entertaining such application, if any be made, and of granting the same if, upon the proof offered in support thereof, it shall seem proper so to do".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 66.

Assignment No. 67:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that the provisions of Section 6 of the Raker Act are an integral part of a statute enacted by Congress in the exercise of its lawmaking power and are not provisions set up by the Congress in the exercise of proprietary powers of the United States.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 67.

Assignment No. 68:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that "the City itself purchases electricity from the Company [381] just as any other customer does".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 68.

Assignment No. 69:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that "control of Hetch Hetchy power is in the hands of the Company from the moment that City electricity enters the Company's lines at Newark".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 69.

Assignment No. 70:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that "rates to be charged consumers of Hetch Hetchy power are not fixed by the City".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 70.

Assignment No. 71:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that electrical energy

"cannot be allocated on a pro rata basis when a commingling occurs",

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 71. [382]

Assignment No. 72:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the agreement of July 1, 1925, between the City and the Company is "one of sale, with title to the electricity passing to the Company at Newark".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 72.

Assignment No. 73:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the arrangement for the distribution and disposal of electric energy effected by the agreement of July 1, 1925, between the City and the Company complied "neither with the letter nor the spirit of the Federal Grant by means of which San Francisco was enabled to construct the Hetch Hetchy project".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion

of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 73.

Assignment No. 74:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that "the Raker Act is not being complied with by San Francisco".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 74. [383]

Assignment No. 75:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the plaintiff "is entitled to an injunction directing the City to cease its present disposal of electric power or be restrained from using the rights granted by the Raker Act for the generation and transmission of such power".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 75.

Assignment No. 76:

That said Court erred in its implied conclusion of law (in its Opinion filed herein April 11, 1938) that the provisions of Section 6 of the Raker Act

are conditions, the violation of which would involve or justify a forfeiture of the or any of the rights granted by the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 76.

Assignment No. 77:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the City should be restrained from using, for the generation and transmission of electric energy, the rights granted by the Raker Act, unless it desists from distributing and disposing of said electric energy in accordance with the agreement of July 1, 1925, between it and the Company.

Counsel for the defendant duly excepted to the ruling involved in [384] the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 77.

Assignment No. 78:

That said Court erred in finding (in Paragraph IV of the Court's "Findings of Fact" filed herein June 24, 1938) that the provisions of Section 6 of the Raker Act were incorporated in said Act to insure the direct distribution of electricity by the City.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 78.

Assignment No. 79:

That said Court erred in finding (in paragraph IV of the Court's "Findings of Fact" filed herein June 24, 1938) that the provisions of Section 6 of the Raker Act were incorporated in said Act "to prevent enjoyment by private corporations of any profits from the" grant made by the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 79.

Assignment No. 80:

That said Court erred in the implied findings (in Paragraph IV of the Court's "Findings of Fact" filed herein June 24, 1938) that the City is now generating and transmitting electricity, solely, through the utilization of the lands, rights and privileges granted to it by the Raker Act and not through the use of said lands, rights and privileges in conjunction with the use of said lands, rights and privileges owned by the [385] City and acquired by it from persons, firms and corporations, other than the United States.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 80.

Assignment No. 81:

That said Court erred in finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "determination of how much electricity shall be accepted at any time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants", which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 81.

Assignment No. 82:

That said Court erred in finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "from the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark, the City is without power over, and the Company has

exclusive and entire control of, its disposition" which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

Counsel for the defendant duly excepted to the ruling involved in [386] the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 82.

Assignment No. 83:

That said Court erred in finding (in subparagraph 2 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of the energy from the City by the Company at Newark and delivery to the ultimate consumers", which said finding is unqualified and treats the 24 per cent deduction mentioned therein as a mere factor for determining the price to be paid by the Company to the City, and gives no effect to the fact that 24 per cent is the amount of transmission, substation and distribution losses, actually found by experience to occur between Newark and consumers's meters in San Francisco.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said

ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 83.

Assignment No. 84:

That said Court erred in finding (in subparagraph 3 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "The price which the City receives for its energy under the contract is in practice fixed and without direct relation to the actual revenue received from its sale to consumers", which said finding is unqualified and gives no effect to the fact that the price which the City receives [387] from the Company is without direct relation to the actual revenue received by the Company from its sales to consumers only in the sense and to the extent that payments made by the Company to the City have been computed in accordance with the formula specified in the agreement of July 1, 1925, and have not taken into account certain reductions in rates made by the Railroad Commission of the State of California in each of the years 1935, 1936 and 1937.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 84.

Assignment No. 85:

That said Court erred in the unqualified finding (in subparagraph 5 of Paragraph IX of the Court's

"Findings of Fact" filed herein June 24, 1938) that "The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 85.

Assignment No. 86:

That said Court erred in finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that the "electric energy originating at Hetch Hetchy is disposed of by the Company to its usual customers in the normal course of its retail trade", without qualifying said finding by the further finding that said customers of the Company were, also, in fact, customers of the defendant.

Counsel for the defendant duly excepted to the ruling involved in [388] the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 86.

Assignment No. 87:

That said Court erred in the unqualified finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "To the City the Company makes no account-

ing of its sales of electricity to consumers".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 87.

Assignment No. 88:

That said Court erred in finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that the accounting between the City and the Company "is limited to monthly statements by the City to the Company for electricity at Newark".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 88.

Assignment No. 89:

That said Court erred in the unqualified finding (in subparagraph 10 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power [389] to the Company by the City".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said

ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 89.

Assignment No. 90:

That said Court erred in finding (in Paragraph X of the Court's "Findings of Fact" filed herein June 24, 1938) that the contract between the City and the Company is a contract to sell for resale.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 90.

Assignment No. 91:

That said Court erred in finding (in Paragraph X of the Court's "Findings of Fact" filed herein June 24, 1938) that the disposal of electric energy by the City to the Company under the contract of July 1, 1925, constitutes a sale for resale of electric energy generated by the City at Hetch Hetchy.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 91.

Assignment No. 92:

That said Court erred in finding (in Paragraph X of the Court's "Findings of Fact" filed herein June 24, 1938) that "The contract to sell contem-

plates, and the sale of energy thereunder includes, a sale [390] and letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 92.

Assignment No. 93:

That said Court erred in finding (in Paragraph XII of the Court's "Findings of Fact" filed herein June 24, 1938) that "The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception, No. 93.

Assignment No. 94:

That said Court erred in finding (in Paragraph XII of the Court's "Findings of Fact" filed herein June 24, 1938) that unless restrained, the City will "continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract" of July 1, 1925.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 94. [391]

Assignment No. 95:

That said Court erred in drawing the conclusion of law (in Paragraph I of the Court's "Conclusions of Law" filed herein June 24, 1938) that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, "includes a selling and letting by the City to the Company of the right to sell or sublet" such energy.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 95.

Assignment No. 96:

That said Court erred in drawing the conclusion of law (in Paragraph I of the Court's "Conclusions of Law" filed herein June 24, 1938) that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, is within the prohibition of Section 6 of the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of

law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 96.

Assignment No. 97:

That said Court erred in drawing the conclusion of law (in Paragraph II of the Court's "Conclusions of Law" filed herein June 24, 1938) that the provisions of Section 6 of the Raker Act "are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety".

Counsel for the defendant duly excepted to the ruling involved in [392] the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 97.

Assignment No. 98:

That said Court erred in drawing the conclusion of law (in Paragraph II of the Court's "Conclusions of Law") that enforcement of the express provisions of Section 6 of the Raker Act "is not subject to estoppel or other equitable defense".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 98.

Assignment No. 99:

That said Court erred in drawing the conclusion of law (in Paragraph III of the Court's "Con-

clusions of Law") that the United States has no plain, speedy or adequate remedy at law.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 99.

Assignment No. 100:

That said Court erred in drawing the conclusions of law (in Paragraph IV of the Court's "Conclusions of Law") that the plaintiff is entitled to an injunction perpetually restraining the defendant from disposing, in accordance with the agreement of July 1, 1925, between defendant and the Company, of electric energy generated by the City in connection with its Hetch Hetchy project. [393]

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 100.

Assignment No. 101:

That said Court erred in drawing the implied conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that the provisions of Section 6 of the Raker Act are conditions, the violation of which by the defendant would entail or justify a forfeiture of the or some of the rights granted by the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 101.

Assignment No. 102:

That said Court erred in drawing the conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that in default of desisting from its disposal, in accordance with the agreement with the Company dated July 1, 1925, of the electric energy generated by it in connection with its Hetch Hetchy project, the defendant be enjoined and restrained from utilizing, for such disposal, the lands, rights and privileges granted to it, by the Raker Act for the purpose of generating electric energy.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 102. [394]

Assignment No. 103:

That said Court erred in making its order of June 28, 1938 (nunc pro tunc, as of April 11, 1938) by which it denied defendant's motion for a dismissal of said cause made at the conclusion of the hearing of said cause.

Counsel for the defendant duly excepted to said order and to the ruling involved, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 103.

Assignment No. 104:

That said Court erred in making its decree in said cause which was filed June 28, 1938, in and by which said Court provided that the defendant should be enjoined from distributing and disposing of electric energy generated by it in connection with its Hetch Hetchy project in the manner provided by the agreement of July 1, 1925, between the defendant and the Pacific Gas & Electric Company, and that unless it did so it should be restrained from using for the distribution and disposal of said electric energy, any of the rights or privileges granted to it by the Raker Act.

Counsel for the defendant duly excepted to said decree and to the ruling involved therein, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 104.

Assignment No. 105:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the provisions of Section 6 of the Raker Act are conditions and not covenants. [395] The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 106:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the disposition of property not granted to the City and County of San Francisco by the Raker Act (i.e., the electric energy generated and owned by the defendant) might be and that it was constitutionally restricted by the provisions of Section 6 of the Raker Act. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 107:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that it was within the law making power of Congress under the Constitution of the United States to restrict, in the manner attempted by Section 6 of the Raker Act, the disposition by the defendant of the electric energy generated by it in connection with its Hetch Hetchy project. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed ex-

cepted to) but said exeception is not numbered in the record herein. [396]

Assignment No. 108:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the provisions of Section 6 of the Raker Act were and are enforcible against the defendant. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 109:

That said Court erred in the ruling in its Decree herein that the defendant's method of disposal of the electric energy generated and transmitted by it through a utilization of the lands, rights and privileges granted to it by the Raker Act (i.e., in accordance with its contract of July 1, 1925, with Pacific Gas and Electric Company) is a violation of the provisions of Section 6 of said Raker Act, which prohibit the sale or letting or the right to sell such electric energy. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 110:

That said Court erred in the ruling in its decree herein that any disposal by the defendant of the electric energy generated and transmitted by it through a utilization of the lands, rights and privileges granted to it through the Raker Act, whereby the right to sell or sublet said energy is sold or sublet to any private corporation or individual, will likewise violate the provisions of Section 6 of the Raker Act. The defendant duly excepted to said ruling through [397] the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 111:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the plaintiff did not waive the provisions of Section 6 of the Raker Act by acquiescing in a period of more than ten years from and after July 1, 1925 in defendant's mode of distributing and disposing of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with said contract of July 1, 1925. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 112:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the provisions of Section 6 of the Raker Act with respect to the distribution and disposal of the electric energy generated by the defendant in connection with its Hetch Hetchy project were not impossible of performance, by reason of the fact that the bonded debt limitations imposed by the Constitution of California upon the defendant prevented the defendant from acquiring its own system for the transmission, distribution and disposal of said electric energy and compelled the defendant to use the system of a public utility corporation for the purpose as the defendant did by and through its contract of July 1, [398] 1925 with Pacific Gas and Electric Company. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 113:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that it was

and is within the constitutional law-making power of the Congress of the United States of America to impose restrictions upon the use of property of a municipal corporation of a state of the United States, such as were sought to be imposed by the City and County of San Francisco by the provisions of Section 6 of the Raker Act, in respect of the disposition and distribution of the electric energy generated by said City and County in connection with its Hetch Hetchy Project, and that the provisions of said Section 6 of said Raker Act, considered as an enactment by the Congress of the United States in the exercise of its law-making power under the Constitution of the United States, were not unconstitutional. By its said ruling, said Court deprived the defendant of rights and immunities granted and guaranteed to it by the Constitution of the United States, and particularly by the provisions of Section 8 of Article I of said Constitution, by the provisions of Article IX, Article X, and by the provisions of Section 1 of Article XIV of the amendments to said Constitution, the benefit of which rights and immunities and of said Constitution and the Articles and Sections thereof and of the amendment thereto last mentioned, the defendant invoked and invokes and relied and relies upon. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was [399] deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 114:

That said Court erred in denying the defendant's petition for a rehearing of said cause. Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 105.

Wherefore, in order that the foregoing assignments of error may be and appear of record, said defendant presents the same to the Court, and prays that such disposition thereof be made as is in accordance with law and the statutes of the United States in such cases made and provided, to the end that said decree be reversed.

Dated: October 17th, 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant.

[Endorsed]: Filed Oct. 17, 1938. [400]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL, FIXING AMOUNT OF SECURITY, AND DIRECTING CITATION TO ISSUE.

The defendant in the above entitled cause, having this day presented to the Court its petition for an order allowing its appeal from the decree in said

cause which was made, filed and entered therein on June 28, 1938, fixing the amount of the security to be required of it to perfect its said appeal, and directing that a citation issue to plaintiff as provided by law;

It Is Hereby Ordered:

(1) That said appeal be and the same is hereby allowed upon defendant giving a bond in the sum of Five Hundred Dollars ($500.00) which shall be conditioned as required by law and shall be approved by this Court; and [401]

(2) That a citation to the plaintiff issue as provided by law.

Dated: October 17th, 1938.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Oct. 17, 1938. [402]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents: That we, City and County of San Francisco, State of California, a municipal corporation, as principal, and Massachusetts Bonding and Insurance Company, a corporation, organized under the laws of the State of Massachusetts and duly qualified to do business in the State of California, and to execute bonds of the character herein mentioned, as surety, are

held and firmly bound to United States of America, plaintiff in the above entitled cause, in the sum of Five Hundred Dollars ($500.00) to be paid to said plaintiff, for the payment of which well and truly to be made, we hereby bind ourselves and our respective successors and assigns, jointly and severally, firmly, by these presents.

Whereas, on the 28th day of June, 1938, in the Southern [403] Division of the District Court of the United States, for the Northern District of California, in a suit then pending in said Court, and numbered 4173-R on the Equity Docket of said Court, in which suit the above named plaintiff was plaintiff, and the above named defendant was defendant, a decree was rendered against said defendant and said defendant has obtained from said court an order allowing an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and has had a citation issued, directed to said plaintiff, and citing and admonishing it to be and appear at a session of said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, State of California, within thirty (30) days from the date of said citation;

Now, Therefore, the condition of the above obligation is such that if said defendant shall prosecute its said appeal to effect and shall answer all costs, if it fail to make its plea good, then said obligation shall be void, otherwise it shall remain in full force and effect.

It is expressly agreed that in case of a breach of the condition hereof, the above entitled Court, upon notice of not less than ten (10) days to the surety hereunder, may proceed summarily in the cause to determine the amount which said surety is bound to pay on account of such breach, and may render judgment for such amount against said surety and award execution therefor.

In Witness Whereof, we execute this bond this 17th day of October, 1938.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation,

By ANGELO J. ROSSI

Mayor, Principal.

a corporation,

By GUS A. ELBOW

Its Attorney in Fact,

Surety.

Approved as to form.

JNO. J. O'TOOLE

City Attorney.

State of California,
County of San Francisco.—ss.

On this 17th day of October in the year one thousand nine hundred and thirty-eight, before me Carl L. Maritzen, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Gus A. Elbow, known to me to be the duly authorized Agent

an Attorney-in-Fact of the Massachusetts Bonding and Insurance Company, the corporation whose name is affixed to the foregoing instrument; and duly acknowledged to me that he subscribed the name of the Massachusetts Bonding and Insurance Company thereto as Surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) CARL L. MARITZEN

Notary Public in and for said County and State.

My commission expires July 30, 1939. [404]

The above bond is hereby approved.

Dated: October 17, 1938.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Oct. 17, 1938. [405]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Harold J. Boyd, being first duly sworn, deposes and says:

That he now is, and ever since the 17th day of June, 1937, has been, the duly appointed, qualified, confirmed and acting Controller of the City and

County of San Francisco, appointed to said position by the Mayor of said City and County pursuant to the provisions of Section 63 of the Charter of said City and County of San Francisco, and that pursuant to the provisions of Section 64 of said Charter he is the Auditor and General Accountant of said [406] City and County and as such exercises general supervision over the accounts of all officers, commissions, boards and employees of said City and County charged in any manner with the receipt, collection or disbursement of the City and County or other funds in their respective capacities as City and County officials or employees;

That as such Controller, under and pursuant to the provisions of said Section 64 of the Charter, it is his duty to keep accounts and to provide accounting procedure to record:

(a) All budgeted revenues and appropriations together with additions or transfers thereto and therefrom and to show at all times the amount of encumbrances, expenditures or transfers therefrom and the balances therein;

(b) All revenues accrued and liabilities incurred;

(c) All cash receipts and disbursements;

(d) In general, all transactions affecting the acquisition, custody or disposition of values;

That, under and pursuant to the provisions of Section 69 of the Charter, it is the duty of every department and office of the City and County of San Francisco, and of each utility under the control

of the Public Utilities Commission, to make and file with the said Controller, not later than the 15th day of February of each year, a budget estimate setting forth the proposed expenditures and estimated revenues of said respective departments and offices for the coming fiscal year which commences on the first day of July of each year;

That, pursuant to the provisions of said Section, the Public Utilities Commission of said City and County of San Francisco filed with said Controller, on or before the 15th day of February, 1938, a statement of the estimated revenues and expenditures relative to the operation and production of hydro-electric [407] power generated in connection with the Hetch Hetchy project, which said project is under the control and jurisdiction of said Public Utilities Commission;

That said Public Utilities Commission estimated the revenues to the City and County of San Francisco, for the fiscal year commencing July 1, 1938, from said hydro-electric power generated on the said Hetch Hetchy project at the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That pursuant to the provisions of said Section 69 of the Charter, said Controller, upon receiving said statement of the estimated revenues and expenditures, checked the same and found that said estimates were true and correct as far as he could ascertain, and that said Controller did, not later than the 15th day of March, 1938, consolidate,

all and singular, the budget estimates furnished to him by the several departments of the government of the City and County of San Francisco and did transmit them to the Mayor of said City and County in accordance with the provisions of said section, and that said consolidated budget so transmitted to the Mayor showed, and did contain, all and singular, the proposed expenditures of each department of the City and County of San Francisco and the estimated revenues therefrom; and the proposed expenditures and estimated revenues incident to the generation of said hydro-electric power all of which was submitted by said Public Utilities Commission was included in said consolidated budget;

That at the time of submitting said consolidated budget said Controller did also submit to said Mayor a statement showing the anticipated revenues and other receipts from the generation of said hydro-electric power on said Hetch Hetchy project for said ensuing fiscal year;

That thereafter the Mayor of the City and County of San [408] Francisco held public hearings on the budget estimates submitted to him by said Controller, said Controller being present at all of said hearings; and that said Mayor made no changes in the estimated revenues to be received by the City and County of San Francisco for the fiscal year commencing July 1, 1938, from the generation of hydro-electric power on said Hetch Hetchy project but approved said estimate and, not later than the first day of May, 1938, transmitted to the Board

of Supervisors said budget estimate for all departments and offices of said City and County of San Francisco and the proposed budget of expenditures of said City and County for the said fiscal year commencing July 1, 1938, which consolidated budget estimate included a detailed estimate of all revenues from each department of the City and County of San Francisco for said fiscal year and in which said estimate of revenues was included the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars as the revenue from the generation of hydro-electric power on the Hetch Hetchy project, and with said budget estimate submitted by said Mayor as hereinbefore set forth, said Mayor submitted a draft of the Annual Appropriation Ordinance for the said fiscal year commencing July 1, 1938, which showed, all and singular the various and several amounts to be expended by said City and County during the said fiscal year;

That thereafter, and under and pursuant to the provisions of Section 72 of the Charter, the Board of Supervisors, after due notice by publication as provided in said section, fixed a date or dates for public hearings on said proposed budget and said proposed appropriation ordinance, and in conformance with the notice given of said hearings, held public hearings on the said proposed budget and proposed appropriation ordinance; that said Board of Supervisors made no change in the estimated revenues, as set for h in said budget estimate, which were to be received by [409] said City and County

from the generation of hydro-electric power on said Hetch Hetchy project; and thereafter said Board of Supervisors passed an Annual Appropriation Ordinance, which said ordinance set forth all the anticipated revenues which were to be received, and all anticipated expenditures which were to be paid out by the City and County of San Francisco during the fiscal year commencing July 1, 1938, a copy of which Annual Appropriation Ordinance is attached hereto and marked Exhibit A and made a part hereof and from which it will appear, on page 7 thereof, that said Board of Supervisors, in finally passing said ordinance anticipated the revenue to be received from the generation of hydro-electric power on said Hetch Hetchy project at the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That this affiant states that the said revenue received from the generation of hydro-electric power on the Hetch Hetchy project is received in practically equal monthly installments and that should said revenue be discontinued as of the 28th day of December, 1938, the City and County of San Francisco will be deprived of approximately One Million Two Hundred Thirty Thousand Five Hundred ($1,230,500.00) Dollars revenue which it anticipated would be received for the purpose of carrying on its municipal functions for the fiscal year commencing July 1, 1938;

That on the 28th day of August, 1926, the Supreme Court of the State of California, in an action

entitled Adolph Uhl vs. John B. Badaracco, et al, which said action was numbered in said Court S. F. No. 12,161, decided, adjudged, decreed and determined that the portion of the Hetch Hetchy project which was used for the generation of hydro-electric power was an integral part of said Hetch Hetchy project and that the revenue therefrom should be applied as follows: (a) for the payment of operating expenses of the said Hetch Hetchy project; (b) for the necessary repairs and [410] reconstruction of said project; (c) for the payment of interest on, and the sinking fund of, the bonds issued for the construction of said project;

That at the time of said adjudication by said Supreme Court, said City and County of San Francisco had voted, and approved and sold bonds for the construction of said Hetch Hetchy project in the amount of Fifty Five Million ($55,000,000.00) Dollars, one issue of said bonds being in the sum of Forty Five Million Dollars and another issue being in the sum of Ten Million Dollars; and that subsequent to said Ten Million Dollar issue said City and County of San Francisco issued additional bonds in the sum of Thirty Million Five Hundred Thousand ($30,500,000.00) Dollars for the completion of said Hetch Hetchy project;

That the bond interest and redemption charges for the fiscal year commencing July 1, 1938, on all of said bonds, amounts to Four Million Nine Hundred Ninety Seven Thousand Three Dollars ($4,997,003.00), which said sum is more than the reve-

nues produced from said Hetch Hetchy project; and that in the expenditures provided for in said Annual Budget and Appropriation Ordinance there was appropriated, for the fiscal year commencing July 1, 1938, from said anticipated revenue of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars to be received from the generation of hydro-electric power on said Hetch Hetchy project, the sum of Two Million One Hundred Ninety Thousand Three Hundred Eighty-six ($2,190,386.00) Dollars for the purpose of meeting the bond interest and redemption on said bonds voted for the construction and completion of said Hetch Hetchy project; and that the difference between the said sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars estimated to be received from the generation of hydro-electric power on said Hetch Hetchy project for the fiscal year commencing July 1, 1938, and the [411] said sum of Two Million One Hundred Ninety Thousand Three Hundred Eighty Six ($2,190,386.00) Dollars was estimated and budgeted to be used for the payment of the operating expenses of said Hetch Hetchy project, pension charges for the employees engaged in work thereon, and the proportionate payments for compensation insurance and accident reserve funds established by the Public Utilities Commission, and for repairs, maintenance and reconstruction of said project;

That at the present time there is sufficient water impounded in the several dams maintained in said

Hetch Hetchy project to operate the Moccasin Creek Power House at full capacity during the remainder of the fiscal year commencing July 1, 1938, and to produce the estimated revenue provided for in the budget estimate adopted by said Board of Supervisors as aforesaid and should the said revenue anticipated to be received from the development of hydro-electric power on said project be stopped or curtailed, the said City and County of San Francisco will not be able to meet the several obligations arising by reason of its municipal activities provided for in its Annual Budget and Appropriation Ordinance and will especially be unable to meet the interest and redemption payments on the bonds issued for the construction and completion of said Hetch Hetchy project;

That prior to the 15th day of September, 1938, the Board of Supervisors did, by ordinance, levy a tax upon all the common property in the City and County of San Francisco, the amount which would be provided by said tax together with the total amount of receipts and revenues estimated to be received from all sources, would be sufficient to meet all appropriations made by said Annual Appropriation Ordinance hereinbefore referred to, and that this affiant made all the calculations as to the amount of receipts and revenues to be received from all sources and reported the same to [412] the said Board of Supervisors, and in reporting said receipts and revenues this affiant took into consideration the fact that there would be received, during

the fiscal year commencing July 1, 1938, from the distribution of hydro-electric power generated on said Hetch Hetchy project the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That said Board of Supervisors, in fixing its annual tax rate for the fiscal year commencing July 1, 1938, took into consideration the fact that there would be received as revenue from the generation of hydro-electric power on the Hetch Hetchy project the said sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars and that in providing for the payment of the interest and redemption of said bonds issued for the construction and completion of said Hetch Hetchy project which might accrue, become due or have to be paid during the fiscal year commencing July 1, 1938, said Board, on the recommendation of said Controller, took into consideration the fact that the anticipated revenue from the generation of hydro-electric power on said Hetch Hetchy project would be Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That if the said sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars is not received from the generation of said hydro-electric power on the said Hetch Hetchy project, the activities of the City and County of San Francisco in administering to the poor, the aged and the needy, and in paying the pensions allowed to widows and orphans, and in carrying on its govern-

mental functions will have to be curtailed or abandoned and the city will not be able to pay the amounts due upon the interest and sinking fund on the bonds issued for the construction and completion of the Hetch Hetchy project and that by reason of said non-payment the City and County of San Francisco will be [413] deemed to have failed in its obligation to meet the bond interest and redemption due on said bonds, all of which will cause the city irreparable loss and damage.

Therefore this affiant submits that no action should be taken by this Honorable Court which would interfere with the payment and production of the revenue anticipated by the officials of the City and County of San Francisco and on which the annual tax rate was based.

HAROLD J. BOYD
Controller.

Subscribed and sworn to before me this 7th day of November, 1938.

[Seal] H. BRUNNER,
Deputy County Clerk.

[Endorsed]: Filed Nov. 7, 1938. [414]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco,

on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

The application for an Order suspending operation of the injunction herein, came on to be heard. John J. O'Toole, and Robert M. Searls, Esqrs., appearing as attorneys for the defendant and Frank J. Hennessy, Esq., United States Attorney, appearing for the plaintiff. Mr. O'Toole presented and filed the Affidavit of Harold J. Boyd, in support of said application. After hearing Mr. O'Toole, Mr. Searls and Mr. Hennessy, it is Ordered that said application for an order suspending operation of injunction, be and the same is hereby continued to December 20th, 1938, for further hearing. [415]

[Title of District Court and Cause.]

ORDER DIRECTING THAT CERTAIN ORIGINAL EXHIBITS BE TRANSMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, FOR INSPECTION IN CONNECTION WITH DEFENDANT'S APPEAL.

It appearing to the Court that the map exhibits annexed to plaintiff's amended complaint herein and plaintiff's exhibits 3, 4 and 5, Defendant's Ex-

hibit A (in evidence) and defendant's Exhibits P and Q (for identification) offered upon the hearing of this cause and referred to in the Statement of Evidence for use on defendant's appeal from the final decree herein, are of such size that it is impracticable to include them or photostatic copies of them in the record on appeal, and that it is proper that said exhibits be inspected by the United States Circuit [416] Court of Appeal for the Ninth Circuit upon the hearing of said appeal;

Now, Therefore, It Is Hereby Ordered:

(1) That the map exhibits to the amended complaint herein may be omitted from the printed record on appeal; and

(2) That the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with the record on defendant's said appeal, plaintiff's amended complaint and each of the exhibits above mentioned, for inspection and consideration of said amended complaint and said exhibits by said Court in connection with said appeal.

Dated November 7th, 1938.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Nov. 7, 1938. [417]

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL J. OST

State of California,
City and County of San Francisco.—ss.

Paul J. Ost, being first duly sworn, deposes and says:

That he is the Paul J. Ost who previously testified as a witness called in behalf of defendant in this case, and his testimony appears at pages 180 to 234 of the transcript herein; that he is at the present time Manager and Chief Engineer of the Electrical Power Bureau of the Public Utilities Commission of San Francisco, and is in charge of the operations of the hydro electric power plants [418] on the Hetch Hetchy project, and has been in charge of such operation since the completion of said plants; that by reason of his position he is familiar with the various features and operating problems of the Hetch Hetchy project; that if the City and County of San Francisco were required on December 28, 1938, under the terms of the decree herein to cease from disposing of any of its electric energy through the agency of the Pacific Gas and Electric Company, there would be a shortage of electric energy available for delivery to San Francisco necessary to meet the consumers' demand for such energy, and that a substantial period of time would be required before the Pacific Gas and Electric Company could open up and operate a sufficient number of additional hydro electric units to compensate for such shortage; that as the City of San

Francisco has no distribution system of its own and cannot possibly acquire one prior to December 28, 1938, either by construction or purchase, the only alternative under the terms of the Court's decree would be to shut down the Moccasin power plant and Early Intake power plant on the Hetch Hetchy project. Said power plants are located on the line of the Hetch Hetchy aqueduct, and if the Moccasin power plant is shut down there is no manner by which the flow of water passing through said plant under a very high head could be safely continued unless auxiliary structures and pipe lines were built to by-pass said plant. Affiant estimates that the cost of such structures and pipe lines would exceed the amount of $100,000, and no funds have been appropriated or are available for such construction; that unless such structures were built it would be necessary to close the gates at the Early Intake end of the eighteen mile Mountain Division tunnel on the Hetch Hetchy project and prevent the water of the Tuolumne River from flowing [419] through said tunnel. This in turn would cut off a substantial part of the present water supply of San Francisco and allow it to go to waste down the Tuolumne Canyon. If the third paragraph of the Court's decree were made effective it would require the City to open all gates in the Hetch Hetchy reservoir, and drain said reservoir, and at the same time to close all gates in the aqueduct leading from the Tuolumne Canyon, permitting all of the water of the Tuolumne River to waste down stream, with possible flood injury to farm lands in the valley

and possible detriment to the City's water rights due to wastage and non-user.

Affiant further states that if said power plant were shut down and all of the revenue therefrom thereby cut off, the City would be under expense aggregating at least $50,000 a year for operating and maintenance costs of its valuable power plants and structures, all of which would have to be provided from other sources than power revenues.

Affiant further states that if said power plant were shut down it would result in the necessary discharge of about eighty men actually engaged in the production and transmission of electricity and water and in maintaining the City's power houses. The earnings of these men aggregate $156,000 a year and enable them to support their families. They have been in the City's employ from five to fifteen years, and affiant is informed and believes that under present conditions would have great difficulty in obtaining reemployment. In addition to this, more than $200,000 a year now expended in California in the purchase of materials, supplies, equipment and contractual services in connection with such operation would be discontinued in the event of a shut down, with consequent loss of business to the community. Furthermore, much of the electrical equipment in said [420] power houses is of such a nature as to deteriorate rapidly if not kept in service, and affiant of his own knowledge knows that the City and County of San Francisco would suffer great monetary loss from such deteri-

oration if such power plant were shut down and required to be kept in an idle condition.

Affiant summarizes the necessary results of compliance with the Court's decree on its effective date, December 28, 1938, as being to cause a deficit in the supply of electric energy required by power consumers in San Francisco, a hazard to the adequacy of the City's water supply, a possible irreparable detriment to its water rights on the Tuolumne River, and an expense to the City of more than $100,000 in construction of capital structures, and more than $50,000 annually in operating expense, which would have to be met from other sources than power revenues which would be lost due to such a shut down.

PAUL J. OST

Subscribed and sworn to before me this 17th day of December, 1938.

[Seal] JAMES F. McCUE,
Notary Public, in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Affidavit of Paul J. Ost, is hereby admitted this ——— day of December, 1938.

.....

[Endorsed]: Filed Dec. 20, 1938. [421]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern Dis-

trict of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 20th day of December, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Defendant's application to suspend the injunction heretofore issued herein came on to be further heard. John J. O'Toole and Robert M. Searls, Esqrs., appearing as attorneys for defendant and Frank J. Hennessy, Esq., United States Attorney and William E. Licking, Esq., Assistant United States Attorney, appearing as attorneys for plaintiff. Mr. O'Toole introduced and read the affidavit of Paul J. Ost. After argument by the attorneys for the respective parties, it is ordered that the operation of the injunction heretofore issued herein be and the same is hereby suspended until January 27, 1939. [422]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT

To the Clerk of the above entitled Court:

You are hereby requested to prepare a transcript of record in the said cause, as required by law to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, not later than thirty days from the date hereof,

under the appeal heretofore perfected in said cause, and to include in said transcript the following:

(1) Bill of Complaint for Injunction filed herein April 27, 1937;

(2) Subpoena issued to the defendant upon the filing of the Bill of Complaint with proof of its service;

(3) Amendments to Bill of Complaint for Injunction filed herein June 25, 1937;

(4) Answer of Defendant to Bill of Complaint as amended, filed herein July 20, 1937;

[423]

(5) Opinion of Court Directing Injunction to Issue, filed herein April 11, 1938;

(6) Proposed Findings of Fact and Conclusions of Law, submitted by plaintiff and lodged May 19, 1938;

(7) Defendant's Proposed Amendments to Plaintiff's said proposed Findings of Fact and Conclusions of Law, which were served and lodged by defendant May 31, 1938;

(8) Findings of Fact and Conclusions of Law filed herein June 24, 1938;

(9) Decree filed herein June 28, 1938;

(10) Petition for Rehearing, filed herein July 8th, 1938;

(11) Order Entertaining Petition for Rehearing, made and filed July 8, 1938;

(12) Plaintiff's Answer to Petition for Rehearing, filed herein July 11, 1938;

(13) Order Denying Petition for Rehearing, made July 26, 1938;

(14) Petition for Allowance of Appeal, filed herein October 17, 1938;

(15) Assignment of Errors filed herein October 17, 1938;

(16) Order allowing Time for Filing Statement of Evidence in said cause, filed herein October 17, 1938;

(17) Order allowing appeal, fixing amount of security, and directing issuance of citation.

(18) Bond on Appeal, with aproval of Court thereto, filed herein October 17, 1938;

(19) Citation on Appeal, with proof of service thereof;

(20) Order deferring Consideration of Suspension of Injunction dated October 17, 1938.

(21) Minute order made by the Court respecting the suspension pending appeal of the injunction which by the Decree herein was ordered to be issued.

(22) All minutes of the Court and all orders made in the cause, not specifically mentioned herein;

(23) All certificates made by the Clerk of this Court with reference to the proceedings, rulings and decrees of the Court herein;

(24) The Certificate of the Clerk of this Court to the correctness of the Record on Appeal in this cause; [424]

(25) Stipulation and Order made and filed August 26, 1938, with respect to procedure which should govern appeal;

(26) Notice of Appeal dated October 17, 1938, and filed the same day;

(27) Statement of Evidence filed herein November 7, 1938;

(28) Order dated November 7, 1938, directing transmittal of certain original documents to the Circuit Court of Appeals for Inspection;

(29) All endorsements of filing and acknowledgments and proof of service of pleadings and other documents filed in the cause and mentioned above;

(30) This Praecipe.

Dated: November 7th, 1938.

JOHN J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant and Appellant.

Receipt of a copy of the within Praecipe for Transcript is hereby admitted this ——— day of November, 1938.

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.....

Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Nov. 7, 1938. [425]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of Cali-

fornia, do hereby certify that the foregoing 425 pages, numbered from 1 to 425, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of United States of America vs. The City and County of San Francisco, a municipal corporation, No. 4173-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $80.30, and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of December, A. D. 1938.

[Seal] WALTER B. MALING,
Clerk.

B. E. O'HARA,
Deputy Clerk. [426]

[Title of District Court and Cause.]

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States of America.

To the United States of America, Plaintiff in the above enfitled cause, Greeting:

You are hereby notified that in a certain cause in equity in the Southern Division of the United States District Court for the Northern District of

California, Numbered 4173-R, wherein United States of America is plaintiff, and the City and County of San Francisco (a municipal corporation) is defendant, the above entitled Court, by its order filed and of record in the office of the Clerk thereof, has allowed the defendant in said cause an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit from the decree against said defendant heretofore made and entered [427] in said cause; and

You Are Hereby Cited and Admonished to be and appear at a session of said United States Circuit Court of Appeals for the Ninth Circuit to be held in the City and County of San Francisco, State of California, within thirty (30) days from the date hereof, to show cause, if any there be, why said decree so rendered against said defendant, as mentioned in said order allowing said defendant an appeal therefrom, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, this 17th day of October, 1938.

A. F. ST. SURE,
United States District Judge.

Receipt of the foregoing Citation is hereby admitted this 17 day of October, 1938.

FRANK J. HENNESSY,
United States Attorney.
Attorneys for Plaintiff
and Respondent.

[Endorsed]: Filed October 17, 1938. [428]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9055.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

STIPULATION.

It Is Hereby Stipulated between the parties in the above entitled appeal that the Clerk of the Court need not print the "Annual Appropriation Ordinance of the City and County for the Fiscal Year 1938-1939," attached to the affidavit of Harold J. Boyd following page 414 of the typewritten record on appeal, but that the parties may refer to and incorporate in any briefs or petitions, which they may respectively file on this appeal, such por-

tions of said Ordinance as they may desire to rely upon and the Court need only examine the portions so printed in such briefs or petitions.

JOHN J. O'TOOLE,
City Attorney.
DION R. HOLM,
Assistant City Attorney.
ROBERT M. SEARLS,
Attorneys for Appellant.
FRANK J. HENNESSY,
United States Attorney.
W. E. LICKING,
Assistant United States Attorney.
Attorneys for Appellee.

It Is So Ordered:

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Filed Dec. 28, 1938. Paul P. O'Brien, Clerk.

[Endorsed]: No. 9055. United States Circuit Court of Appeals for the Ninth Circuit. City and County of San Francisco, a municipal corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 27, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 19, 1939.

Before: Wilbur, Denman and Mathews,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered motion of appellant for supersedeas pending appeal submitted to the court for consideration and decision on motion of Mr. Robert M. Searls, counsel for appellant.

Further ordered cause on merits argued by Mr. Robert M. Searls, Mr. John J. O'Toole, City Attorney, City and County of San Francisco, and Mr. Garret W. McEnerney Amicus Curiae, for appellant, and by Mr. Frank J. Hennessy, United States Attorney, and Messrs. William D. Donnelly, and Norman W. Littell, Attorneys, Department of Justice, counsel for appellee, and submbitted to the court for consideration and decision; further briefs 30 x 30 x 20.

(Clerk's Note: Order filed June 9, 1939, superseding decree of District Court of injunction.)

Compared by: MGY-GI

Department of the Interior
Bureau of Reclamation
Washington, D. C.

Office of the Commissioner

CERTIFICATE

Pursuant to the provisions of the Act of Congress approved August 24, 1912 (37 Stat., 497), I hereby certify that the annexed copy of letter dated June 25, 1906, from President Theodore Roosevelt, The White House, Washington, to the Hon. E. A. Hitchcock, Secretary of the Interior, constitutes a full, true, and literal exemplification of copy of said letter contained in the official files in the custody of this office.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Bureau of Reclamation to be affixed, this 30th day of June, A. D. 1939.

[Seal] JOHN C. PAGE
Commissioner,
Bureau of Reclamation.

Copy—EE

Copy

The White House
Washington

June 25, 1906

My dear Mr. Secretary:

As I think it best that there should be a record of our attitude in the Los Angeles Water Supply bill, I am dictating this letter to you in your presence, and that of Senator Flint on behalf of the California Delegation, of Director Walcott of the Geological Survey, and of Chief Forester Pinchot. The question is whether the city of Los Angeles should be prohibited from using the water it will obtain under this bill for irrigation purposes. Your feeling is that it should be so prohibited because the passage of the bill without the prohibition might establish a monopoly in the municipality of Los Angeles as regards irrigation, by permitting the municipality to use the surplus of the water thus acquired, beyond the amount actually used for drinking purposes, for some irrigation scheme.

Senator Flint states that under the proposed law Los Angeles will be seeking to provide its water supply for the next half century, which will mean that at first there will be a large surplus, and that in order to keep their rights they will have to from the beginning draw the full amount of water (otherwise the water will be diverted to other uses and could not be obtained by the city); and while if the city did not need the water it would be proper

that the other users should have it, yet it is a hundred or a thousand fold more important to the State and more valuable to the people as a whole if used by the city than if used by the people of Owens Valley. Senator Flint further says that the same water that is used for drinking and washing is also used on innumerable little plots of land in and around Los Angeles for gardening and similar purposes, and that to prohibit this would so nearly destroy the value of the bill as to make it an open question whether the city either could or would go on with the project; it being open to doubt whether the words "domestic use" would cover irrigation of this kind.

Mr. Walcott and Mr. Pinchot state that there is no objection to permitting Los Angeles to use the water for irrigating purposes so far as there is a surplusage after the city's drinking, washing, fire and other needs have been met. They feel that no monopoly in an offensive sense is created by municipal ownership of the water as obtained under this bill, and that as a matter of fact to attempt to deprive the city of Los Angeles of the right to use the water for irrigation would mean that for many years no use whatever could be made by it of the surplus water beyond that required for drinking and similar purposes.

I am informed by Senator Flint that the law of California provides that if a municipality sells water to people outside the municipality, it must be

at the same rate that it sells it to those within the municipality.

I am also impressed by the fact that the chief opposition to this bill, aside from the opposition of the few settlers in Owen's Valley (whose interest is genuine, but whose interest must unfortunately be disregarded in view of the infinitely greater interest to be served by putting the water in Los Angeles) comes from certain private power companies whose object evidently is for their own pecuniary interest to prevent the municipality from furnishing its own water. The people at the head of these power companies are doubtless respectable citizens, and if there is no law they have the right to seek their own pecuniary advantage in securing the control of this necessary of life for the city. Nevertheless, their opposition seems to me to afford one of the strongest arguments for passing the law, inasmuch as it ought not to be within the power of private individuals to control such a necessary of life as against the municipality itself.

Under the circumstances I decide, in accordance with the recommendations of the Director of the Geological Survey and the Chief of the Forestry Service, that the bill be approved, with the prohibition against the use of the water by the municipality for irrigation struck out. I request, however, that there be put in the bill a prohibition against the City of Los Angeles ever selling or letting to any corporation or individual except the municipality, the right for that corporation or that indi-

vidual itself to sell or sublet the water given to it or him by the city for irrigation purposes.

Sincerely yours,

(Signed) THEODORE ROOSEVELT

HON. E. A. HITCHCOCK,
Secretary of the Interior.

P.S. Having read the above aloud, I now find that everybody agrees to it—you, Mr. Secretary, as well as Senator Flint, Director Walcott, and Mr. Pinchot; and therefore I subscribe to it with a far more satisfied heart than when I started to dictate this letter.

[Endorsed]: Filed July 10, 1909. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, September 13, 1939.

Before: Wilbur and Mathews, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

OPINION

Before: Wilbur, Denman and Mathews, Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from a decree of the District Court holding that the City and County of San Francisco, hereinafter called the "City", has violated Section 6 of the Raker Act[1] (38 Stat. L. 242), by its disposal of electric energy generated and transmitted through utilization of lands and rights granted to the City by the United States under the terms of that Act, and enjoining such violation. The Court also decreed that if the City should fail to comply with the injunction, "It shall be and hereby is enjoined and restrained from using for development and transmission of electric energy any of the lands, rights and privileges granted to it by plaintiff [the United States] by the Raker Act."

Before dealing with the contentions of the parties we will state the facts relevant to the controversy.

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[1] Section 6 of the Raker Act provides: "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee. * * *"

When the Raker Act was passed (December 19, 1913) San Francisco was a rapidly growing city in an area of comparatively small rainfall, with a small run-off from the neighboring hills which was impounded, distributed and sold to the people of San Francisco by a private corporation, the Spring Valley Water Company, under a "constitutional franchise", by means of water mains and other distributing facilities installed for that purpose. The inadequacy and imperfection of this system was largely responsible for the destruction by fire of a large portion of the City in 1906. The City turned its attention to the water supply of the distant Sierra Nevada mountains where there was a relatively abundant supply of water due to heavy snowfall in the winter. The Tuolumne River rises and flows through the Hetch Hetchy Valley in the mountains. Much of this water had been appropriated by irrigators in the San Joaquin Valley, but a large volume of water in the spring run-off flowed into the sea with little benefit, and considerable damage to riparian owners along the river. The proposed plan was to impound this surplus water in the Hetch Hetchy Valley by a large dam and to pay a part of the huge cost[2] of the impounding and

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[2]The report of the Committee to Congress, contained the following estimate of cost: "The power potentiality of the stream is estimated at 115,000 horsepower in its ultimate development. It is proposed to develop this energy in 10,000 horsepower

transmission of the water for nearly 200 miles by the development and sale of electric energy. The Act required the City to both develop and sell electric energy. (Raker Act, Sec. 9 (l), (m), (n), (o)). The immediate requirement of the City was the acquisition of a dependable water supply which would permit the legitimate growth of the City. The development and sale of electrical energy was a purely incidental matter.

At the time the Raker Act was passed there was not only a distributing system for water already installed in the City by a water company, but also there were two systems for the distribution of electric energy, one owned by the Pacific Gas & Electric Company, hereinafter referred to as "the Company", and the other by the Great Western Power Company. As much of the water of the Tuolumne River was required for irrigation and could be stored by the City for only a limited period, and as the electricity could not be stored, it was evidently within the contemplation of the Raker Act that some means for distributing the water and the electric energy should be provided. Either the systems already existing should be used or new systems to be constructed by the City or by someone authorized to use the streets for such purpose. At that

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units, and use the power for public purposes in San Francisco and adjoining cities. * * *

"The ultimate cost of the project is estimated at $77,000,000. The initial cost for the first installation necessary to bring 200,000,000 gallons of water to the city is $37,500,000."

time, and at present, the City was committed by its charter (Ch. 2, Art. 12, Charter of 1900; Sec. 119, Charter of 1935) to a general policy of public ownership of all public utilities.[3]

Nothing whatever is said in the Raker Act with reference to the acquisition or construction of a distributing system within the City for either water or electric energy, although the Act required the construction of a dam and an electric generating plant. The omission of such provision is significant, not only because of the fact that such a system was obviously necessary, but also because the cost thereof was so great as almost to equal, if not to exceed, all the other costs involved in the undertaking.

The City, under the terms of the Act, has constructed dams and reservoirs for the impounding of water at such elevations above the city that by releasing the water from the reservoirs a large amount of electric power can be developed, as required by the Act. The City has constructed plants at Moccasin Creek and at Early Intake for the generation of power. The power generated from the water stored in Lake Eleanor and impounded by the Lake Eleanor dam was used by the City during the construction of the Hetch Hetchy dam, but is now available for distribution by the City.

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[3] "It is hereby declared to be the purpose and intention of the people of the City and County that its public utilities shall be gradually acquired and ultimately owned by the City and County of San Francisco."

In the original plan submitted to Congress it was contemplated that the water from the Hetch Hetchy reservoir would be pumped over the Coast Range and that a large part of the electric energy developed at the Moccasin plant would be utilized for that purpose. Consequently, at the time the plan was conceived and presented to Congress the disposition of surplus power other than that used by the City for municipal purposes, was a problem of minor importance. A change was made in the plan whereby the City drove a water level tunnel under the Coast Range and thus released a large amount of electric energy developed by the project for distribution and sale by the City. The Company had available to the people of San Francisco a complete distributing system for serving the people of the City with electric energy. The City completed the power line from its power generating plants on the Hetch Hetchy project toward San Francisco only as far as Newark. Although the City had no distributing lines or system and had not completed its transmission lines beyond Newark, it had constructed its power plants and had impounded water sufficient to generate a large amount of electric energy which would be wholly lost if the water, as it passed through the dam and canals of the Hetch Hetchy project, were not utilized for that purpose. In this situation, on July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy gener-

ated at the Moccasin power plant of the Hetch Hetchy project. In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof.

The claim of the United States is that the disposition of electric energy by the contract of July 1, 1925, is a sale of energy to the Company for resale purposes and, consequently, it is a violation of Section 6 of the Raker Act. It is also contended that even if the contract be construed as an agency agreement there is still a violation of the Raker Act by the City since it is claimed there was granted to the Company for a consideration the right as agent to sell the energy.

The City, on the other hand, contends that the contract between it and the Company was an agency contract whereby the Company was employed as agent of the City to distribute the electric energy for it and that such an agency contract does not violate Section 6 of the Raker Act.[1]

The contract, in brief, provides that the City employs the Company as "temporary distributor" for the City of all the electric energy generated at the Moccasin Power House (up to the maximum of 70,000 kilowatts, 3 phase, 60 cycle alternating current of approximately 105,000 volts) at not to exceed a 75 per cent monthly load factor, to distribute

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[1]The City has made other contentions which, in view of the conclusions of this Court, are not necessary to consider.

the same for municipal, industrial and domestic purposes, furnishing all step-down and standby services and metering and collecting from consumers. The charges to consumers are not to exceed lawfully established rates. The electric energy is to be delivered into the system of the Company at Newark and transmitted by the Company to San Francisco. Transmission losses from Newark to San Francisco, amounting to 24 per cent, are to be deducted in estimating the amount of energy delivered. Receipts from the consumers is estimated at 2.383 cents per kilowatt hour (which was the actual average revenue for the year 1924, the year preceding the year that the contract went into effect) and from this sum the Company is to deduct 73.065% as compensation covering its operating expenses and use of capital and to remit the remaining 26.935% to the City. The contract also provides that the return to the City should be proportionately changed in event of increases or decreases in the rates. Under the contract, the Company is bound to make payment for energy the City could have delivered at Newark, under the terms of the contract, regardless of its acceptance and use by the Company.

The intention of the parties as expressed in the contract of July 1, 1925, was to create an agency agreement. It was the deliberate purpose of the parties to avoid making a sale and to avoid a transaction which could be construed as a sale of electric energy by the City to the Company. The contract

was drawn with that purpose and intent. It is conceded that the terminology used in the contract is that appropriate to an agency and not to a sale. In the contract it is stated that "the City hereby employs the Company and the Company accepts employment as temporary distributor for and in behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines." And the energy is referred to as being "consigned and delivered" at Newark to the Company "for transmission and distribution to consumers" in San Francisco. Although the mere terminology used in a contract will not necessarily determine its character, the court should give effect to the express intent of the parties unless the electric energy is actually sold to the Company. That is, the intent of the parties to create an agency should be given effect unless they have so bargained that the ownership of the electric energy actually vested in the Company under the contract.

We are not dealing with a case where third persons have relied upon the apparent ownership and control of personal property in extending credit or in acquiring an interest in the property. Decisions dealing with such problems are not germane. No such reliance or detriment by the United States is shown because of the existence of the claimed agency agreement in the case at bar.

The United States, in support of its contention that the agreement was one of sale, makes the fol-

lowing contentions in respect to provisions of the contract which, it claims, shows a sales agreement: The Company has exclusive control over the energy once it enters the system of the Company at Newark; deduction of 24 per cent of the energy delivered at Newark does not show that the risk of loss was on the City as would be the case in an agency agreement; the price received by the Cit for electric energy under the contract is in practice fixed without direct relation to the actual revenue received from its sale to consumers; the City is assured of payment and the Company bound to pay for the electric energy specified in the contract without regard to acceptance or use; the rates charged to consumers are not fixed by the City but by the State Railroad Commission; the electric energy is disposed of by the Company to its usual customers in the normal course of its retail trade; the Company is the sole creditor named in the statements rendered to consumers for electric energy originating at Hetch Hetchy; moneys collected by the Company are not segregated with regard to the portion deemed attributable to power produced at Hetch Hetchy; the Company does not account to the City on the sales of electricity to consumers; the City is itself a purchaser from the Company of electric energy, part of which originates at Hetch Hetchy; the contract is terminable by either the City or the Company upon one days notice and subject to cancellation by the parties upon request of the Secretary of the Interior upon his determination that the agreement violates the Raker Act.

Upon analysis, it is clear that these points upon which the United States relies do not show that there is vested in the Company such rights to the electric energy as to constitute a sale of it to the Company regardless of the expressed intention of the parties to create an agency agreement for the transmission of the electric energy.

To say that the Company has exclusive control over the energy once it enters its system at Newark is to overlook the factual situation in regard to the transaction. What loss of control amounts to in this case is merely that the City delivers the electric energy to lines of the Company at Newark. Generation and consumption of the electric energy are simultaneous. The City generates the power and controls the power plant. The ultimate consumer obtains the electric energy by turning his switch, plugging his socket, or pushing a button, etc. Thus, to compare the control of the electric energy by the Company during the time of its transmission (about 1/4650 of a second) with the control of an agent or wholesaler of ordinary merchandise is to overlook what actually takes place in the transmission of the energy. The only control of the Company is that it controls its distribution facilities. But its duty to serve the public is fixed by law. There is nothing in the element of control of the distributing system pointing to a sale. The arrangement made was a practical method of utilizing a public utility corporation as an agent to distribute power generated by the City to its customers in the city.

As to the deduction of 24 per cent of the Hetch Hetchy electric energy as delivered at Newark, we agree with the United States, that it has no bearing one way or the other on the question of passing of title to the energy as it was a deduction computed on average loss. Actually it was not a loss at all in the economic sense. The so-called loss was energy expended in the act of transmission. It was necessarily used for that purpose.

The fact that the price which the City receives is in practice fixed, without reference to all the possible variants in receipts, has no weight as indicating a sale. The formula used in arriving at the price to be received by the City was based on actual receipts of the Company for the sale of electric energy in 1924. The parties to the contract provided for a change of the amount to be received by the City in case of a change in the rates. That neither of the parties have thought it expedient to take advantage of this provision of the contract is beside the point. The method chosen was clearly a reasonable and practical arrangement for compensation of an agent. There is and could be no secret agreement between the parties supplanting or supplementing the contract in question.

One of the points mainly relied upon by the United States as showing a sale is the fact that the City is assured of payment and the obligation of the Company to pay for the electric energy delivered at Newark is unconditional. But in view of the circumstances of this case, where the amount of electric energy supplied did not fill the requirements

of the Company, this provision merely amounts to an agreement by the Company to dispose of the City's electric energy ahead of its own and a guarantee of disposition of all energy supplied under the contract.

The contention of the United States that because the rates prescribed by the contract were not to exceed the lawfully established rates (i.e., those fixed by the Railroad Commission) a sale is shown, is clearly without merit.

The contention is that the contract between the City and the Company does not fix the rates to be charged to the consumer, that the City had power to fix such rates as to electric energy owned and distributed by it and that the fact that the power to fix the rates was conferred upon the Company by the City indicates a sale of electric energy to the Company. In support of this contention it is claimed that the provision in the contract that the rates should not exceed the maximum rates fixed by law, that is, by the Railroad Commission, allowed the Company to charge any rates less than the maximum thus prescribed and therefore permitted the Company to exercise a right of ownership of the electric energy delivered to it by the City. The Company has charged the rates fixed by the Railroad Commission and the conduct of the parties and the eighth covenant of the contract providing for a change of the Company's compensation in the event of a change in rates indicate that it was the intent of the parties that these maximum rates should be charged to the consumers until changed

by competent authority. There is no delegation by the City in the contract to the Company of any power to fix the rates to the consumer and if the City had the power to fix the rates by reason of its ownership it still retains that power unless it be assumed that the contract is one of sale instead of agency, which is the very point in dispute.

The fact that the Company disposes of the energy to its usual customers, that the Company is the sole creditor named in the statements of account, that moneys collected by the Company are not segregated and that the Company makes no accounting of its sales to consumers is of little importance as showing a sale under the circumstances of this case. Here a public utility corporation is one of the contracting parties and a city the other. A practical method was adopted in arriving at its compensation to be paid for transmission and for the use of the Company's facilities. Assuming that the parties could make an agency agreement for distribution of the electric energy it was open to them to contract in any manner they could agree upon. The contention of the government that all the proceeds of the sales by the Company belong to the Company begs the question. There is no provision of the contract to that effect. Nor does the fact that the City paid for Hetch Hetchy electric energy delivered to it by separate account at higher rates after it had been stepped down in voltage and converted in frequency, indicate a sale. This was a practical method of balancing the accounts between the par-

ties and of compensating the Company for services performed in changing the character of the electricity and transmitting it to various points of municipal usage.

The fact that the parties may terminate the contract upon one days notice or upon request of the Secretary of the Interior does not indicate intent of the parties to make a sale.

We conclude that there was no sale made by the City to the Company of the electric energy distributed to the customers in San Francisco and that the contract was one by which the City employed the Company to transmit the City's power to the consumers thereof in the City.

The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal.

We conclude that the City did not violate Section 6 of the Raker Act by making a sale of electric energy to the Company.

At the argument before this court it was pointed out to counsel that Section 6 of the Raker Act does not, by its terms, prohibit the City from making a sale of the water or energy for resale purposes but, rather, prohibits the City from "selling or letting

* * * the right to sell" such water or energy. (See note 1) The United States contended at the hearing and in its opening brief that what was prohibited by Section 6 was a sale for resale purposes. This was not disputed by appellant in its briefs. The court is inclined to the view that Section 6 could not be so construed. It is inclined to believe that a sale of the "right to sell" water or electric energy is distinct from a sale of such water or energy and that Section 6 of the Raker Act only prohibited the sale of the "right to sell" to a corporation or person to whom the water or electric energy had been sold. The right to collect compensation for use of water in California is a franchise. The water itself is not owned or sold, it is the usufruct thereof that is capable of private ownership. (Constitution of California, Art. XIV, §§1, 2.) The right to use the streets to distribute electric energy to inhabitants of a municipality is a franchise and the right to distribute such energy is subject to regulation and permission by the Railroad Commission. (See, Oro Electric Corp. v. R. R. Comm., 169 Cal. 466; 147 P. 118; Section 50, Public Utilities Act, St. Ex. Sess., 1911, p. 43.) As a sale by the City to the Company of electric energy could not invest the Company with the right to sell such energy, the court views it as doubtful whether or not the City has violated the Raker Act even if the contract of July 1, 1925 constituted a sale of electric energy to the Company to be resold by it to the inhabitants of the City.

It must be assumed, of course, that Congress, in enacting the Raker Act, understood the full legal effect of its words, "selling or letting * * * the right to sell". (Montclair v. Ramsdell, 107 U. S. 147.) We called for briefs on the subject.

The City, in its brief submitted after the argument, contends that Section 6 of the Raker Act prohibits a sale of electric energy for resale. It states: "The government and the municipality are agreed that Section 6 prohibits sale for resale."

The United States, in its brief submitted after argument, states: "The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City."

It concedes, however, that the Act "did not prohibit employment of an agent for transmission purposes".

In view of the position of the City that the Act prohibits a sale for resale, we base our decision upon the sole ground that the contract between the City and the Company was an agency agreement and not a contract of sale.

As to the contention of the United States, reasserted and amplified in its brief after argument, that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City for disposition of the energy on its behalf, it is sufficient to point out that what we have already said disposes of this question. We point out fur-

ther, however, that there are no words contained in Section 6, supra, that are appropriate to prohibit such an arrangement. The United States relies much on the fact that Section 6 prohibits not only "selling" the "right to sell" but also prohibits "letting" that right. But the term "letting" in Section 6 obviously means leasing. This is clear by the use of the word "to" between the word "letting" and the words "any corporation" in the section. (See note 1).

The decree of the District Court is reversed with instructions to dismiss the complaint which does not state a cause of action.

For disqualification subsequent to submission, Judge Denman did not participate in the consideration or decision of this case.

[Endorsed]: Opinion. Filed September 13, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9055

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with instructions to dismiss the complaint which does not state a cause of action.

[Endorsed]: Filed and entered September 13, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Frank J. Hennessy, U. S. Attorney, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including December 13, 1939; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT
United States Circuit Judge

Dated: San Francisco, California, October 3, 1939.

[Endorsed]: Filed Oct. 3, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred seventy-nine (679) pages, numbered from and including 1 to and including 679, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Robert H. Jackson, Solicitor General of the United States, of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of November, A. D. 1939.

[Seal] PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

Order allowing certiorari

(Filed January 29, 1940)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

DEC 13 1939

No. 587

In the Supreme Court of the United States

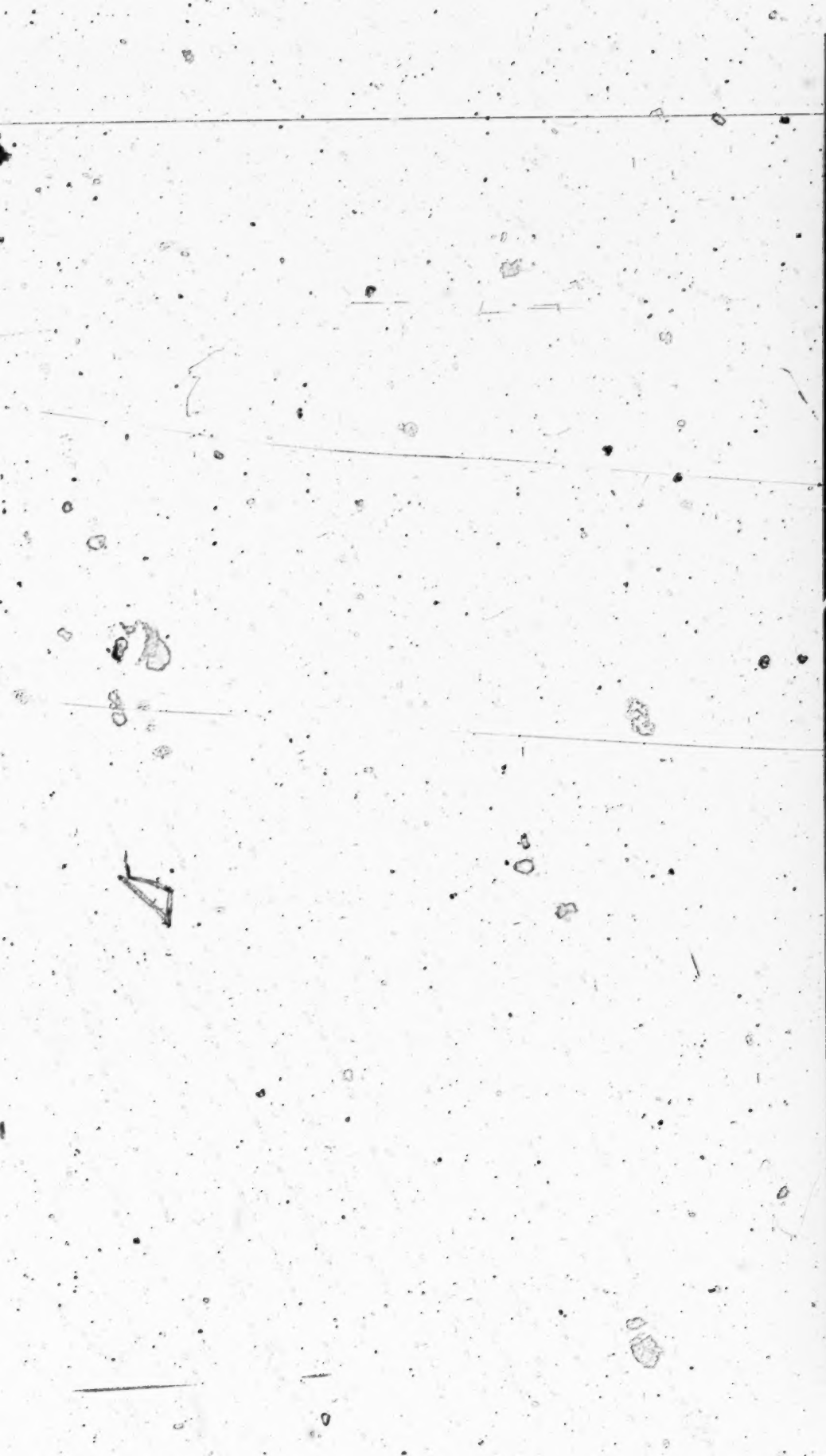
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT



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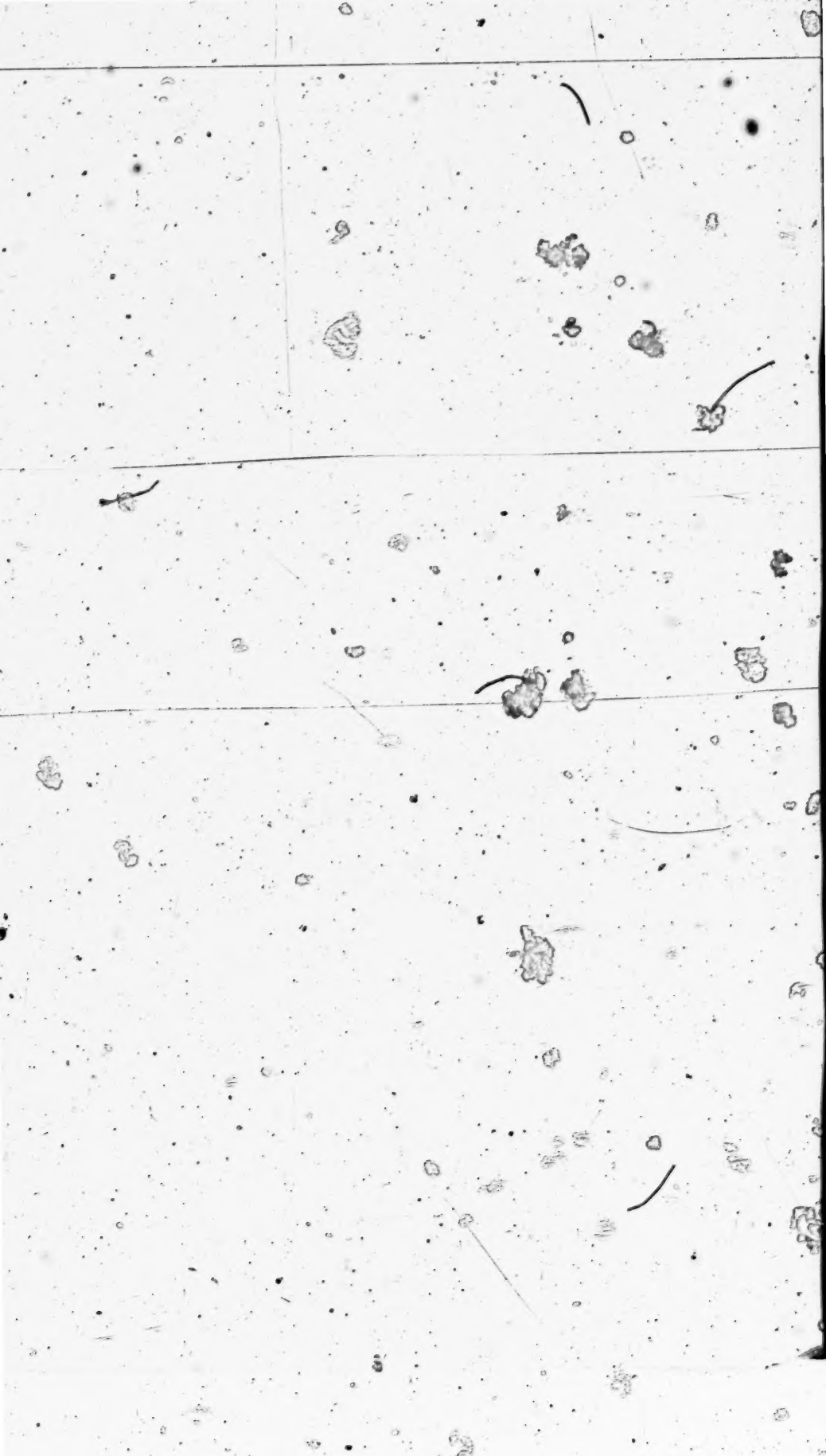

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on September 13, 1939, reversing the decree of the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the trial court (R. 90–125) is reported in 23 F. Supp. 40. The opinion of the circuit court of appeals (R. 661–677) is reported in 106 F. 2d 569.

JURISDICTION

The decree of the circuit court of appeals was entered on September 13, 1939 (R. 678). The jurisdiction of this court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

By the Raker Act of December 19, 1913, the United States granted lands and rights-of-way to the City and County of San Francisco for the construction of a water supply and power project but prohibited the "selling or letting" to any private corporation of "the right to sell or sublet" energy generated through the use of the lands granted. Thereafter the City entered into an agreement with a private corporation for the disposition of such energy by the corporation. Under the agreement the company bears the risk of loss of energy delivered to it for transmission and sale and is obligated to pay the City on a fixed date each month, and at a price fixed without regard to the price the company receives from consumers, for all energy delivered or available for delivery under the contract.

The questions are:

1. Whether the agreement is prohibited even if its effect is to grant to the company the right to sell energy only as agent for the City;

2. Whether, assuming that the Act prohibits only the sale of energy for resale, the agreement provides for such a sale or merely grants the right to sell energy as agent for the City.[1]

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[1] In this petition, the argument will be confined to the first and broader question whether the agreement falls within the prohibition of the Raker Act regardless of the interpretation placed upon the contract. However, if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City.

STATUTE INVOLVED

The Raker Act of December 19, 1913, c. 4, 38 Stat. 242, is printed as an exhibit (R. 12–36, 192–216). The pertinent part of Section 6 provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: * * *

STATEMENT

On April 27, 1937, the United States brought this suit in the Northern District of California to enjoin the City and County of San Francisco (hereinafter called the City) from disposing of electric energy to the Pacific Gas and Electric Company (hereinafter called the Company) under a contract asserted to be in violation of Section 6 of the Raker Act of December 19, 1913, 38 Stat. 242 (R. 2–12).

The City in its answer (R. 41) denied violation of the Act, alleging that the energy is distributed by the company as agent for the City (R. 48).

The district court concluded that the contract disposes of the right to sell energy in violation of Section 6 of the Act (R. 166–167) and entered a decree enjoining the City from disposing of energy under the contract or in any other manner whereby the right to sell or sublet such energy is vested in any individual or corporation other than a municipality (R. 168–170). The circuit court of appeals, with two judges participating, held that the contract is one of agency rather than

sale (R. 661–677), and reversed on the ground that the Act does not prohibit the sale of energy by the Company as agent for the City.

In brief, the facts are as follows:

The Hetch Hetchy project.—Congress passed the Raker Act on December 19, 1913 to permit the use of public lands by the City for a water-supply and hydroelectric project. The Act grants lands in Yosemite National Park and in the Stanislaus National Forest for the City's Hetch Hetchy project, which consists of reservoirs, dams, powerhouses, and other structures essential to water and electric plants. The Act also grants rights-of-way for water conduits, power lines, roads, and communication lines in the Park and Forest and in the public lands along the route between the Hetch Hetchy reservoir and Newark, California (Sec. 1).

By Section 9 the grant is made subject to the City's observance of all the conditions of the Act. Among these conditions is the provision (Sec. 9 (m)) that the grantee—

> shall develop and use hydroelectric power for the use of its people and * * * sell or supply such power for irrigation, pumping, or other beneficial use * * *.

Any excess remaining after satisfaction of specified public uses may be disposed of for private consumption (Sec. 9 (l)).

Section 6, here sought to be enforced, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet

> the water or the electric energy sold or given to it or him by the said grantee: * * *

The grant with "all the terms and conditions therein contained" was accepted by the City on January 13, 1914 (R. 217–220). By 1925 the City had completed both its main power plant at Moccasin Creek, which utilizes water from the Hetch Hetchy reservoir, and a transmission line from the plant to Newark, about 40 miles southeast of San Francisco (R. 281–282, 307–308).

Thereupon, it entered into the contract with the Pacific Gas and Electric Company which inaugurated the arrangement here in question (R. 76–90). The contract provides for the delivery of the entire energy output of the Moccasin Plant to the Company at Newark at not to exceed a 75-percent monthly load factor.[2] The Company agrees to furnish all necessary peak load and steam stand-by services, to collect the charges, and to "make accounting to" the City each month for 76 percent of the energy delivered to it at a rate of 26.935 percent of 2.383 cents per kilowatt-hour.[3] The Company is to retain the remaining 73.065 percent as its "compensation for services rendered" (R. 80–81, 83). Upon the failure of the Company to take all of the energy available under the contract, the monthly payment to be made to the City is to be computed on the

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[2] Load factor is the ratio between the average load and the maximum load capacity of the plant (R. 299).

[3] The contract recites that the average transmission and distribution losses of energy from the Newark substation to consumers in San Francisco is 24 percent, and that 2.383 cents is the average revenue per kilowatt-hour received by the Company in San Francisco in 1924 (R. 79–80, 82–83).

basis of the amount of energy which the City could have delivered (R. 84–85).

Operation under the contract of July 1, 1923.—The lands granted by the United States are now being used in connection with the project (R. 6, 43–44, 281). All of the energy delivered by the City at Newark is generated with water stored on, and conducted over, such lands, and the energy itself is transmitted over such lands (R. 280–282, 307–308, 411, 428).[4] The power passes from the lines of the City to those of the Company at Newark, where it merges with energy from other sources in the Company's power pool. The City's compensation is measured by the Newark meter readings (R. 283–285, 291, 305). The rate of generation and the output of the City's Moccasin plant is controlled exclusively by the system load dispatcher, who is an employee of the Company alone (R. 282–284, 302). Through him its control is integrated with the control of other plants owned by the Company.

Bills to customers are issued under the name of the Company and do not indicate that the Hetch Hetchy plants are the source of the power (R. 285). The City itself is a customer-consumer of energy for its municipal railways, street lights, and public buildings, and is billed by the Company at the same rates as those

[4] Since 1935 the output of the Early Intake plant built in 1918 to supply power for construction of the project (R. 407) and using water from Lake Eleanor Reservoir in Yosemite Park (R. 282) has been diverted into the transmission lines from the Moccasin plant to San Francisco (R. 411, 428). In the trial court's findings (R. 161) and throughout this petition energy generated at both the Moccasin and Early Intake plants is referred to as originating at Hetch Hetchy.

charged other consumers, without regard to the volume or price of the Hetch Hetchy energy delivered to the Company at Newark (R. 285–286, 293).

The position of the Secretary of the Interior.[5]—In August 1925 Secretary Work twice declined to rule on the validity of the contract, stating that the matter should be determined at some later date after operation (R. 339–340, 356–357). On November 8, 1930, Secretary Wilbur by memorandum to the Mayor of the City stated that indefinite continuance of the contract could not be permitted (R. 238–239). A month later, in a letter to the City Attorney, he referred to the "City's three-year program for compliance with the provisions of the Raker Act respecting power distribution" and asked to be advised of completion (R. 322–323).

After a public hearing in May 1935 (R. 224–226, 228–229, 233) Secretary Ickes concluded that the contract was in violation of the Raker Act (R. 230–269), and on April 2, 1937, he requested the Attorney General to bring this suit (R. 274–279).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that Section 6 of the Raker Act does not prohibit the granting to private corporations of the

[5] In 1923 Solicitor Edwards of the Department of the Interior ruled that Section 6 of the Act prohibited sale for resale of surplus energy from the Early Intake plant (R. 346), and, relying on its legislative history (R. 347–351), asserted that the Act clearly contemplates public ownership, sale, and distribution (R. 346). However, he suggested the feasibility of an agreement for *transmission* of the City's power over privately owned lines (R. 234, 353–354).

right to sell electric energy originating at Hetch Hetchy as agent for the City.

(2) In failing to hold that the contract of July 1, 1925, between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act.*

REASONS FOR GRANTING THE WRIT

In holding that Section 6 of the Raker Act does not prohibit this agreement, by which the City grants to a private corporation the right to sell energy generated at Hetch Hetchy, the court below has passed upon an important question of federal law which has not been but should be settled by this Court.

Section 6 of the Act prohibits the City "from ever selling or letting" to any private corporation or individual "the right to sell or sublet" water or electric energy generated on the Hetch Hetchy project. We submit that that section, by its terms, expresses a broad policy, unqualified by any exemption, to prevent energy from the Hetch Hetchy project from being sold by private parties in any capacity, and leaves no room for any exception under which the City may grant to a private corporation, for a consideration, the right to sell such energy as its agent.

(1) *The terms of the statute.*—The terms of the statute are plain. The "selling" prohibited is not the selling of energy for resale, but the selling of the right to sell energy. Once this is clear, there would seem to be

* The second of these specified errors is not urged as a reason for granting the writ of certiorari, but is reserved for argument on the merits.

no question that the prohibition applies to any arrangement whereby, for a consideration, the City grants to a private corporation any right to sell, in any capacity, energy made available to it from Hetch Hetchy. Plainly, the "selling" prohibited includes any such grant, even though the legal title to the energy does not pass through the company, and even though the consideration, like that in this case, is the assumption of an obligation to furnish peak load and steam stand-by services (R. 81) and to accept and pay for a fixed minimum of energy each month (R. 84–85) rather than a less complicated price per unit of energy sold. See *Speigle* v. *Meredith*, 22 Fed. Cas. No. 13227, at p. 911 (C. C. Ind. 1868); *Borland* v. *Nevada Bank*, 99 Cal. 89, 93, 33 Pac. 737 (1893); *Cole* v. *Laird*, 121 Iowa 146, 149, 96 N. W. 744 (1903); *Mansfield* v. *District etc. Assoc.*, 154 Cal. 145, 147–148, 97 Pac. 150, 151 (1908).

The prohibition applies to electric energy "given" to private corporations as well as to energy "sold." This phrase "sold or given" covers every means by which electric energy is, or can be delivered, furnished, or supplied to a private corporation. Obviously "given" was not used with the idea that the City would make free donations of power to private corporations. To construe it as synonymous with "sold" would deprive it of meaning altogether. Plainly, it refers to the mere transfer of possession. See *Galloway* v. *Chatham R. R. Co.*, 63 N. C. 147, 154 (1869); *Smith* v. *Burnet*, 35 N. J. Eq. 314, 324 (1882); *Dresser* v. *Zabriskie*, 39 Atl. 1066, 1067 (N. J. Ch. 1898); *State* v. *Bove*, 98 N. J. L. 350, 353, 116 Atl. 766, 768 (1922).

The City's contention that, although Section 6 forbids the sale of energy for resale (R. 676), it does not prohibit the granting of the right to sell energy as agent, seeks to make the issue turn solely upon the question whether legal title to the energy passes through the Company. In view of the policy evident from the terms of the Act we believe that any question relating to the title to the energy is wholly irrelevant. The plain purpose of Section 6 is to keep the selling of the energy out of the control of private agencies and in the hands of public agencies exclusively. The City has sold to the Company a right to make such sales. We submit that the selling of that right is plainly prohibited by the terms of Section 6 of the Act, regardless of where the title to the energy lies.

(2) *The legislative history of the statute.*—An examination of the legislative history of Section 6 confirms the view that the intention of Congress in enacting Section 6 was to prevent all selling by private agencies of electric energy from the Hetch Hetchy project.

The report on the bill by the House Committee on Public Lands states that the provision is designed to prevent any monopoly or private corporation from obtaining control of the water supply of San Francisco.[7] H. Rept. 41, 63d Cong., 1st sess., 1913, p. 11.

The Congressional debates show that there was common agreement that the purpose of Section 6 was to prevent perpetuation of the monopoly enjoyed by the

[7] Since Section 6 prohibits in identical terms the selling of the right to sell water and electric energy, it is plain that the purpose expressed in the report is equally applicable to both water and electric energy.

Pacific Gas and Electric Company and its associates (R. 265) and to make certain that the power generated through the use of the lands granted would be sold directly to consumers by the City. Compare *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625.

Senator Norris, a member of the Senate Public Lands Committee which reported the bill, stated in debate (51 Cong. Rec. 343, Dec. 6, 1913):

> This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. * * * Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

After reading from a report of the Bureau of Corporations dated March 14, 1912, showing a virtual electric power monopoly in the Pacific Gas and Electric Company, and associated companies (see R. 265), he said that the bill (51 Cong. Rec. 344–345)—

> if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition. * * * if the power of the Hetch Hetchy is developed it will come into direct competition

with what a sworn official of the Government says is a monopolistic control of the hydro-electric power of California.

Senator Pittman, one of the bill's sponsors, declared: "It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly," and indicated that it would aid in relieving the people of the area which it would serve "from the monopoly that has been supplying them with light and power in that section of the country for years" (50 Cong. Rec. 5473).

The following colloquy indicates the interpretation of the bill by its author, Representative Raker of San Francisco (50 Cong. Rec. 3905):

> Mr. SUMNERS. Is it the purpose of this bill to have San Francisco supply electric power and water to its own people?
>
> Mr. RAKER. Yes.

Other statements throughout the debate[*] indicate consistent agreement upon the purpose to provide that the energy should be sold exclusively by the City, directly to consumers, and to make certain by that provision that it would not only be kept out of the control of private agencies, particularly the Pacific Gas and Electric Company and its associated companies, but would be placed in competition with the service rendered by those companies.

[*] See especially remarks of Rep. Ferris, Chairman of the House Lands Committee in charge of the bill, 50 Cong. Rec. 4093; Rep. Thomson, member of the same committee, 50 Cong. Rec. 3999, 4097; see also 50 Cong. Rec., pp. 3996, 3997, 4099, 4110; 51 Cong. Rec. pp. 6–7, 132, 136, 182, 273.

To make this purpose effective Congress used the peculiar language of Section 6—forbidding the "selling" of "the right to sell" energy. That language is precisely adapted to the purpose of forestalling monopoly which, by definition, imports exclusive control of the market, or of the right or ability to sell.

In granting to the Pacific Gas and Electric Company the right to sell the energy, the City has sought to circumvent this purpose. To sustain its action, it urges a strained construction of the Act. Plainly, the terms of the Act and its legislative history require, instead, a construction which will carry out its evident public object.[9] *Standard Ins. Co.* v. *United States*, 302 U. S. 442, 444; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321.

(3) *The importance of the issue.*—The legislative and administrative policy of the Federal Government has always been to preserve the national parks inviolate from private commercial exploitation. In this case Congress, in granting rights to use lands in the national parks for the production of power, determined that this policy could best be attained by preventing private agencies from acquiring any right to sell energy produced through the granted use of the public lands. The decision below permits the respondent and the Pacific Gas and Electric Company to make effective a different

[9] The statute is clearly within the power of Congress to make rules and regulations respecting the lands of the United States and contracts contemplating their use. Const., Art. IV, sec. 3, cl. 2. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 423–424; *Camfield* v. *United States*, 167 U. S. 518, 525, 526; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404, 405; *Ruddy* v. *Rossi*, 248 U. S. 104, 107; *Stephenson* v. *Binford*, 287 U. S. 251, 274, 275.

policy of their own choosing. This they have done through a contract based upon a construction of the Act which is hypertechnical at best, and which we believe to be clearly erroneous. Whether local and private interests may thus frustrate a plainly expressed Congressional purpose to protect the use of national parks against private exploitation is, intrinsically, an issue of great general importance.

Furthermore, the purpose of Congress to bring energy from the Hetch Hetchy project into direct competition with power supplied by private utilities was intended for the benefit not only of the people of the City and County of San Francisco but of all people in the San Francisco area.[10] The effectuation of that purpose has been thus far successfully prevented. The effect of its ultimate success or defeat on rates for electric energy will be of direct concern to the entire population of that area.

Wherefore it is respectfully submitted that this petition for writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

[10] See Section 8 of the Act (H. Rept. No. 41, 63d Cong., 1st sess., pp. 11, 16, 25, 43).

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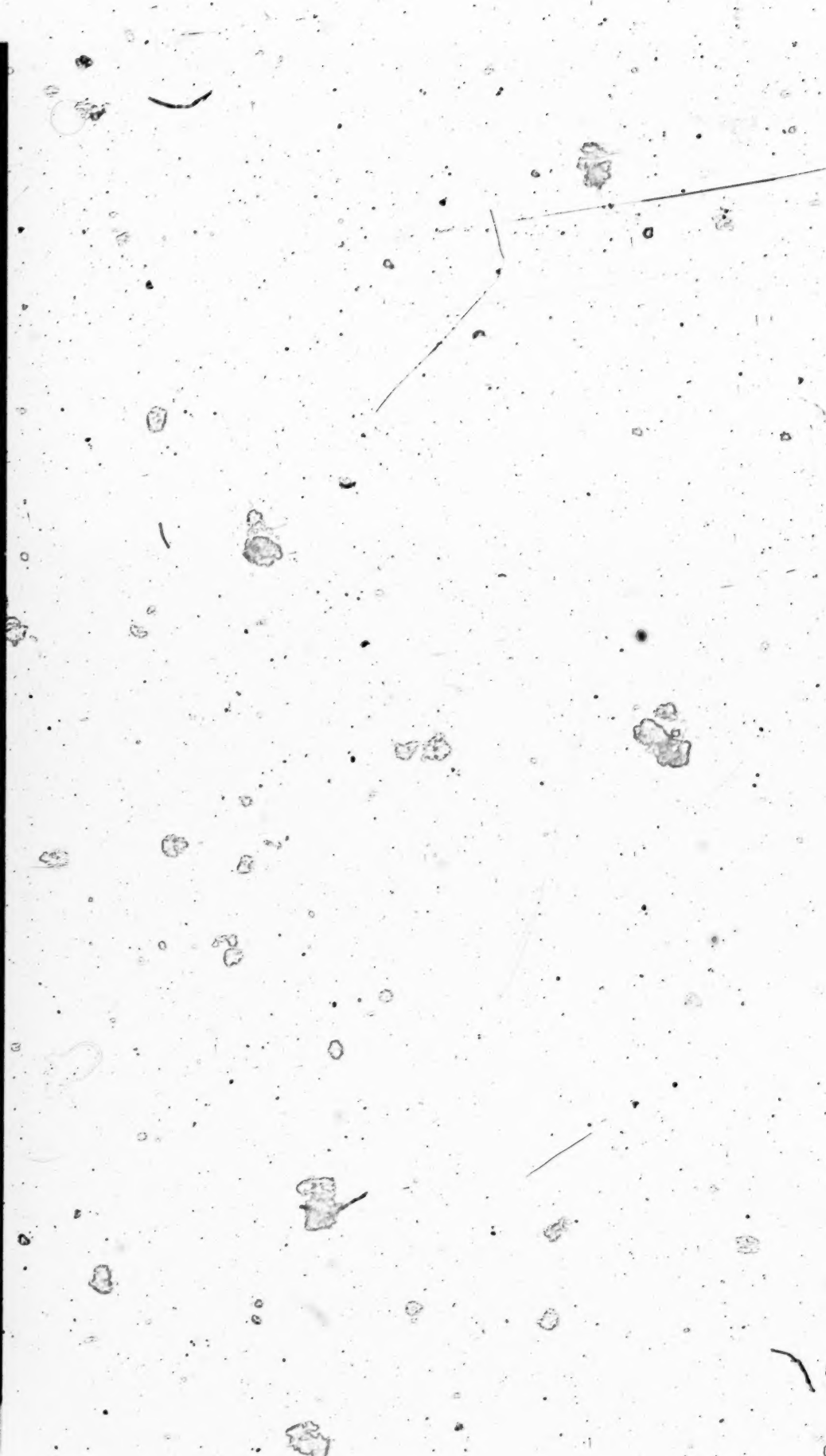

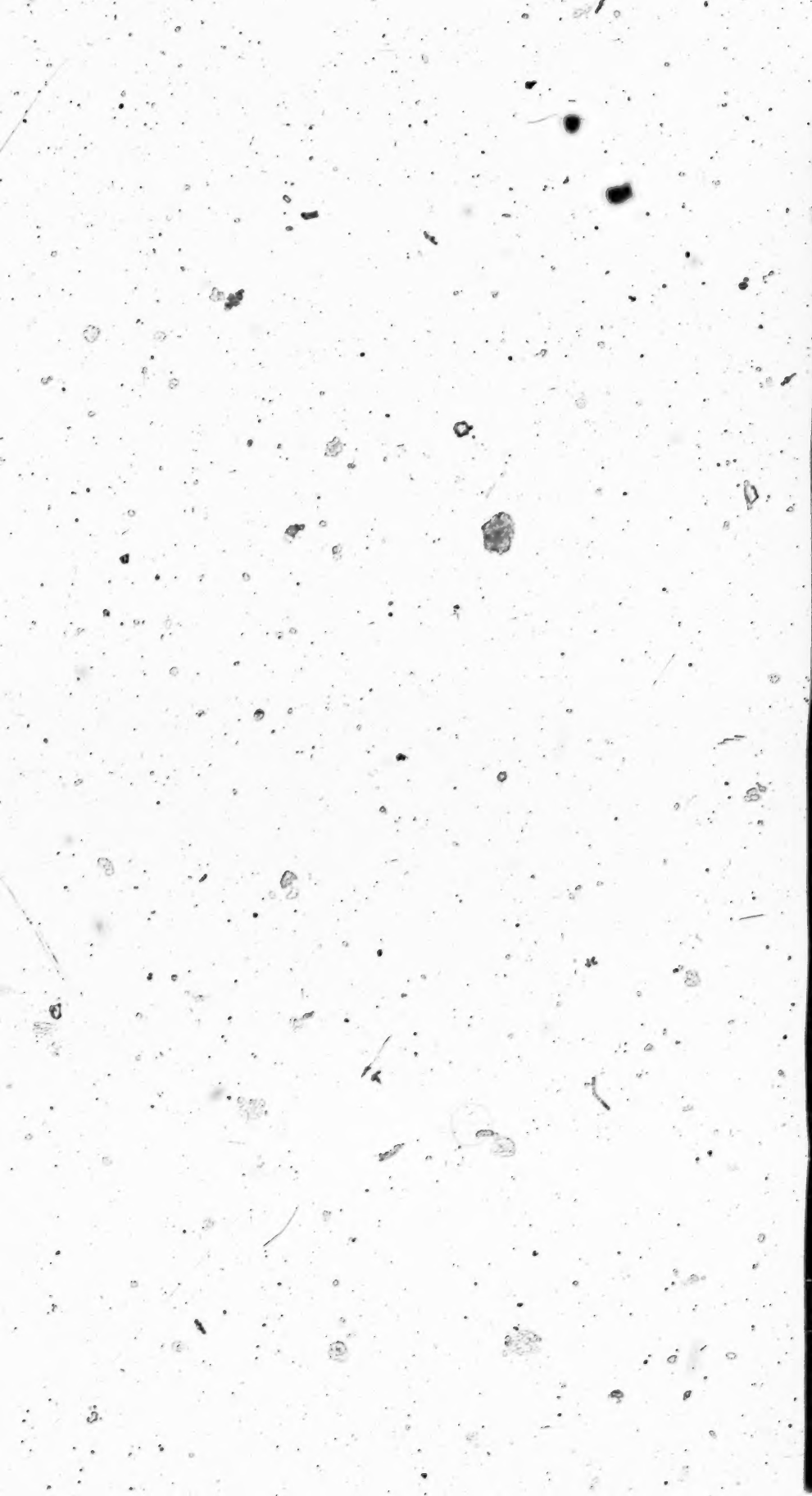

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No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the trial court (R. 90–125) is reported in 23 F. Supp. 40. The opinion of the circuit court of appeals (R. 661–677) is reported in 106 F. 2d 569.

JURISDICTION

The decree of the circuit court of appeals was entered on September 13, 1939 (R. 678). Petition for a writ of certiorari was filed December 12, 1939, and was granted on January 29, 1940 (R. 681). The jurisdiction of this Court rests upon section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

By the Raker Act of December 19, 1913, the United States granted lands and rights-of-way to the City and County of San Francisco for a power project but prohibited the "selling or letting" to any private corporation of "the right to sell or sublet" the electric energy "sold or given to it" by the City. Thereafter the City entered into an agreement with a private corporation under which the City, at a price fixed without regard to actual revenues, delivers energy to the corporation for transmission and sale to consumers. The corporation is not subject to the City's direction in the fixing of rates to consumers, but has complete control of distribution and collections and bears the risk of loss.

The questions are: ——

1. Whether the agreement is prohibited even if its effect is to grant to the corporation the right to sell energy only as agent for the City.

2. Whether, assuming that the Act prohibits only the sale of energy for resale, the agreement provides for such a sale or merely grants the right to sell energy as agent for the City.

STATUTE INVOLVED

The Raker Act of December 19, 1913, c. 4, 38 Stat. 242, printed as an exhibit (R. 12–36, 192–216), is set forth in part at page 4 of the Statement below.

STATEMENT

On April 27, 1937, the United States brought this suit in the Northern District of California to enjoin the City and County of San Francisco (hereafter called the City) from disposing of electric energy to the Pacific Gas and Electric Company (hereafter called the Company) under a contract and in a manner asserted to be in violation of section 6 of the Raker Act of December 19, 1913, 38 Stat. 242 (R. 2–12).

The City in its answer (R. 41) denied violation of the Act, alleging that the energy is distributed by the Company as agent for the City (R. 48).

The district court concluded that the City under the contract disposes of the right to sell energy in violation of section 6 of the Act (R. 164–167) and entered a decree enjoining the City from disposing of energy under the contract or in any other manner whereby the right to sell or sublet such energy is vested in any individual or corporation other than a municipality (R. 168–170). The circuit court of appeals, only two judges participating, reversed, with instructions that the complaint be dismissed (R. 678). It held that the contract is one of agency rather than sale and that the Act does not prohibit the sale of energy by the Company as agent for the City (R. 661–677).

In brief, the facts are as follows:

The Hetch Hetchy project.—Congress passed the Raker Act (R. 12–36, 192–216) on December 19, 1913, to permit the use of public lands by the City

for a water supply and hydroelectric project. The Act grants to the City lands in Yosemite National Park and in the Stanislaus National Forest for the project, which consists of reservoirs, dams, powerhouses, and other structures essential to water and electric systems. The Act also grants rights-of-way for water conduits, power lines, roads, and communication lines in the Park and Forest and in the public lands along the route between the Hetch Hetchy reservoir and Newark, California (sec. 1).

By section 9 the grant is made subject to the City's observance of all the conditions of the Act. Among these conditions is the provision (sec. 9 (m)) that the grantee—

> shall develop and use hydroelectric power for the use of its people and * * * sell or supply such power for irrigation, pumping, or other beneficial use * * *.

Any excess remaining after satisfaction of specified public uses may be disposed of for private consumption (sec. 9 (l)).

Section 6, here sought to be enforced, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: * * *.

The grant with "all the terms and conditions therein contained" was accepted by the City by

formal ordinance approved January 13, 1914 (R. 217-220).

By 1925 the City had completed both its main power plant at Moccasin Creek, which utilizes water from the Hetch Hetchy reservoir, and a transmission line from the plant to Newark, about 40 miles southeast of San Francisco (R. 281–282, 307–308).

Thereupon it entered into the contract with the Pacific Gas and Electric Company which inaugurated the arrangement here in question (R. 76–90). The contract uses the terminology of consignment, and declares that the City employs the Company "as temporary distributor" for the City (R. 80). It provides for the delivery of the entire energy output of the Moccasin plant to the Company at Newark at not to exceed a 75-percent monthly load factor.[1] The Company agrees to furnish all necessary peak-load and steam stand-by services, to collect the charges, and to "make accounting to" the City each month for 76 percent of the energy delivered to it at a rate of 26.935 percent of 2.383 cents per kilowatt-hour.[2] The Company is to re-

[1] Load factor is the ratio between the average actual load and the maximum load capacity of the plant (R. 299). Under the contract, for example, if the maximum monthly production capacity of the Moccasin plant were 100,000 kilowatts, the Company would be required to accept or pay for not more than 75,000 kilowatts per month.

[2] The contract recites that the average transmission and distribution losses of energy from the Newark substation to

tain the remaining 73.065 percent of the 2.383 cents per kilowatt-hour as its "compensation for services rendered" (R. 80–81, 83). Upon the failure of the Company to take all of the energy available under the contract, the monthly payment to be made to the City is to be computed on the basis of the amount of energy which the City could have delivered (R. 84–85).

Operation under the contract of July 1, 1925.— The lands granted by the United States are now being used in connection with and are indispensable to the operation of the project (R. 6, 43–44, 160, 281). All of the energy delivered by the City at Newark is generated with water stored on and conducted over such lands, and the energy itself is transmitted over such lands (R. 280–282, 307–308, 411, 428).[3] The power passes from the lines of the

---

consumers in San Francisco is 24 percent, and that 2.383 cents is the average revenue per kilowatt-hour received by the Company in San Francisco in 1924 (R. 79–80, 82–83). The contract also provides that if the established rates are increased or decreased by lawful authority, the amount to be retained by the Company and the amount to be paid to the City shall be proportionately increased or decreased.

[3] Since 1935 the output of the Early Intake plant built in 1918 to supply power for construction of the project (R. 407) and using water from Lake Eleanor Reservoir in Yosemite Park (R. 282) has been diverted into the transmission lines from the Moccasin plant and is disposed of on the same terms as is the power from that plant (R. 411, 428–429). In the trial court's findings (R. 161) and throughout this brief energy generated at both the Moccasin and Early Intake plants is referred to as originating at Hetch Hetchy.

City to those of the Company at Newark, where it merges with energy from other sources in the Company's power pool. The City's compensation is based upon the Newark meter readings (R. 283–285, 291, 305). The rate of generation and the output of the City's Moccasin plant is controlled exclusively by the system load dispatcher, who is an employee of the Company alone (R. 282–284, 302). Through him its control is integrated with the control of other plants owned by the Company, and the method of such control differs from that of company-operated plants only by reason of the contract provision for delivery at a 75-percent monthly load factor (R. 284, 303).

Bills to customers are issued under the name of the Company and do not indicate that the Hetch Hetchy plants are the source of the power (R. 285). The City itself is a customer-consumer of energy for its municipal railways, street lights, and public buildings, and is billed by the Company at the same rates as those charged other municipal corporation consumers, without regard to the volume or price of the Hetch Hetchy energy delivered to the Company at Newark (R. 285–286, 293).

As the result of rate reductions, the average revenue of the Company per kilowatt-hour for 1935 was 2.361 cents; for 1936, 2.238 cents; and for 1937, 2.113 cents (R. 287, 301). These rates were equivalent to decreases from the contract rate (2.383 cents) of 1, 6, and 11 percent, respectively, or an

average of 6 percent (R. 296–297). But compensation to the City was not decreased and it is still being paid on the basis of 2.383 cents as the average return per kilowatt-hour (R. 288–290).

The position of the Secretary of the Interior.— In August 1925 Secretary Work twice declined to rule on the validity of the contract, stating that the matter should be determined at some later date after operation (R. 339–340, 356–357).[4] On November 8, 1930, Secretary Wilbur by memorandum to the Mayor of the City stated that indefinite continuance of the contract could not be permitted (R. 238–239). A month later, in a letter to the City Attorney, he referred to the "City's three-year program for compliance with the provisions of the Raker Act respecting power distribution" and asked to be advised of completion (R. 322–323).

After a public hearing in May 1935 (R. 224–226, 228–229, 233), Secretary Ickes concluded that the

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[4] In 1923 Solicitor Edwards of the Department of the Interior ruled that section 6 of the Act prohibited sale for resale of surplus energy from the Early Intake plant, and, relying on its legislative history, asserted that the Act clearly contemplates public ownership, sale, and distribution (R. 346–351). However, he suggested the feasibility of an agreement for *transmission* of the City's power over privately owned lines (R. 234, 353–354). A communication of the Acting Solicitor of the Department of the Interior to the Secretary in July 1925 stating that the contract in form was one of sale (R. 359–366) was not adopted by the Secretary (R. 234–236).

contract was in violation of the Raker Act (R. 230–269), and on April 2, 1937, after futile negotiations and efforts to secure action by the City (R. 276–278), he requested the Attorney General to bring this suit (R. 274–279).

SPECIFICATION OF ERRORS TO URGED

The circuit court of appeals erred:

(1) In holding that section 6 of the Raker Act does not prohibit the granting to private corporations of the right to sell electric energy originating at Hetch Hetchy as agent for the City.

(2) In failing to hold that the contract of July 1, 1925, between the City and the Company is a contract to sell energy for resale, prohibited by section 6 of the Raker Act.

SUMMARY OF ARGUMENT

I

Section 6 of the Raker Act prohibits the City "from ever selling or letting" to any private corporation "the right to sell or sublet the water or electric energy sold or given to it" by the City. These words forbid any grant for a consideration of the right to sell Hetch Hetchy energy, regardless of whether title to the energy is transferred to the Company. The legislative history of the statute shows that Congress intended by section 6 to prohibit monopoly—control of the right to sell—by a private corporation, and especially by the Pacific Gas and Electric Company, as well as to provide

for sale to consumers exclusively by the City and to bring the energy from Hetch Hetchy into direct competition with the power supplied by private corporations. H. Rept. 41, 63d Cong., 1st sess., 1913, p. 11. Read in the light of this manifest purpose, section 6 of the Raker Act plainly prohibits the City from granting to the Company for a consideration the right to sell energy, whether "sold" or only "given" to the Company in the broad sense of a mere transfer of possession without passage of title. Cf. *Smith* v. *Burnet*, 35 N. J. Eq. 314, 324 (1882); *Galloway* v. *Chatham R. R.*, 63 N. C. 147, 154 (1869). The City cannot evade the prohibition against selling the right to sell its energy by resort to the legal fiction that "sale by an agent is the sale of the principal" where, as here, it does not make its own sales through a mere employee. This is all the more true because the City in this case has for a consideration endowed the Company with a valuable contract right to sell the City's energy on the Company's account.

II

In any event, the disposition of energy to the Company under the contract is a sale for resale, which is clearly prohibited by the statute, as the City concedes (Br. in Opp. to Pet. for Cert. p. 15). The character of the contract cannot be determined by the form and name applied to it by the parties, but only by the real nature of the transaction con-

templated by its terms. Its many phases must be viewed as a whole and not merely analyzed *seriatim*. Its true character as a contract of sale is disclosed by the facts that under it the Company (1) is obligated to pay for the energy a price bearing no direct relation to the revenue received from consumers, rather than to make a mere accounting of revenues collected, cf. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Howard* v. *Hancock Oil Co.*, 68 F. 2d 694, 698 (C. C. A. 9); (2) sells energy which originates at Hetch Hetchy to the City at a price having no relation to the terms of the contract; (3) fails to segregate revenues derived from Hetch Hetchy energy; (4) names itself as sole creditor in bills to consumers; (5) is not subject to the City's direction in the fixing of rates to consumers; (6) has complete control of the energy, *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 499; and (7) bears the risk of loss, *Coweta Fertilizer Co.* v. *Brown*, 163 Fed. 162, 165 (C. C. A. 6); *In re Rabenau*, 118 Fed. 471, 477 (W. D. Mo.). Considered together, as they must be, these characteristics of the arrangement furnish the strongest evidence that the transfer of the energy to the Company was a sale by the City.

Since, irrespective of transfer to the Company of title to the energy, the City's course is a persistent violation of the statute, the United States is entitled to have its infringement enjoined. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393.

ARGUMENT

I

SECTION 6 OF THE RAKER ACT FORBIDS THE ARRANGEMENT UNDER THE CONTRACT OF JULY 1, 1925, IRRESPECTIVE OF WHETHER THE COMPANY ACTS AS AN AGENT FOR SALE OR AS A BUYER FOR RESALE OF THE ENERGY DELIVERED TO IT

Section 6 of the Raker Act prohibits the City "from ever selling or letting" to any private corporation or individual "the right to sell or sublet the water or electric energy sold or given to it or him by the" City. While the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City, it does contend that the prohibition of the statute applies to any arrangement whereby for a consideration the City grants to a private corporation *the right to sell,* in any capacity, energy made available to it from Hetch Hetchy.

If title to the energy passes from the City to the Company without reservation, this necessarily carries with it the prohibited right to sell, and the City concedes that the selling of the energy with the right of resale is prohibited by the Act (Br. in Opp. to Cert. p. 15). The district court decided that title passed to the Company but was reversed on this

point by the circuit court of appeals. It is not necessary, however, for this Court to consider the Government's argument in this respect in Point II of this brief, if, as the Government contends, the statute prohibits the City from granting to the Company for a consideration a right to sell regardless of whether such grant is accompanied by a transfer of title.

The language of the prohibition broadly covers all "selling or letting" to private corporations of the right to sell and contains no exception with respect to agents. There is no requirement in the statute that title to energy should accompany the transfer of the right to sell; and to imply one would do violence to the plain words of the statute. If Congress had intended to limit its prohibition to a sale of energy for resale, it would have sufficed simply to make the object of the prohibition the restrictive words "energy for resale" instead of the more comprehensive phrase "the right to sell." The words of the statute, on their face, are plainly and simply expressive of a policy against the sale by private corporations or individuals of energy developed through use of the public resources. Since, under the contract here in question, the Company, either as owner of the energy or as agent of the City, does sell Hetch Hetchy energy, it runs afoul of this expressed policy and violates the statute.

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That this section of the Act was framed to prevent the public grant from becoming a private monopoly is evident from the wording of the statute alone. It is disclosed not only by the prohibition against "selling or letting" "the right to sell or sublet," but also by the condition of section 9 (m) that the City "shall develop and use" the "power for the use of its people and * * * sell or supply such power for * * * beneficial use."

The legislative history of the Act reveals the same purpose. The favorable report of the House Committee on Public Lands (H. Rept. No. 41, 63d Cong., 1st sess. (1913) p. 11) states as to section 6:

> This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.[5]

It had long been the policy of the Government to preserve the national parks inviolate from private commercial exploitation, and, obviously, in enacting the Raker Act Congress determined that this policy could best be attained by preventing private interests, especially the Pacific Gas and Electric Company and its associates (R. 265), from acquiring any right to sell energy produced through use of national park lands. The decision below permits the respondent and the Pacific Gas and Elec-

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[5] Since section 6 prohibits, in identical terms, the selling of the right to sell water and electric energy, it is plain that the purpose expressed in the report is equally applicable to both water and electric energy.

tric Company to make effective a different policy of their own choosing. Common agreement on the part of the legislators as to the purpose to prevent monopoly and to achieve direct sale of the energy by the City to consumers was demonstrated throughout the Congressional debates.[6]

Senator Norris, a member of the Senate Public Lands Committee which reported the bill, stated (51 Cong. Rec. 343, December 6, 1913):

> This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. * * *
>
> Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

After reading from a report of the Bureau of Corporations dated March 14, 1912, showing a virtual electric power monopoly in the Pacific Gas and Electric Company and associated companies (see R. 265), he said that the bill—

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[6] Resort may be had by the courts to congressional debates to determine the purpose of an enactment when there was common agreement as to the purpose. *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625.

> if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition. * * * if the power of the Hetch Hetchy is developed it will come into direct competition with what a sworn official of the Government says is a monopolistic control of the hydroelectric power of California (51 Cong. Rec. 344–345).

Senator Pittman, one of the bill's sponsors, declared, "It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly," and indicated that it would aid in relieving the people of the area which it would serve "from the monopoly that has been supplying them with light and power in that section of the country for years" (50 Cong. Rec. 5473).

Representative Raker of San Francisco, author of the bill, agreed in debate that its purpose was to "have San Francisco supply electric power and water to its own people" (50 Cong. Rec. 3905).

Other statements throughout the debate[7] demonstrate unanimity of purpose, to provide for sale exclusively by the City directly to consumers and

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[7] See especially remarks of Rep. Ferris, Chairman of the House Lands Committee in charge of the bill, 50 Cong. Rec. 4093, and of Rep. Thomson, member of the same committee, 50 Cong. Rec. 3999, 4097; see also 50 Cong. Rec. pp. 3996, 3997, 4099, 4110; 51 Cong. Rec., pp. 6–7, 132, 136, 182, 273.

to bring the energy from Hetch Hetchy into direct competition with the power supplied by privately owned utility companies. Because there could be no competition between the City's and the Company's generating plants if the sale and control of the output of both were reposed in the Company, it was necessary, in order to achieve the object of effective competition, for Congress to forbid the City from selling to private corporations or individuals the right to sell the energy. This is precisely what Congress did.

Statutes are to be liberally construed in aid of their evident public objects. *Standard Ins. Co.* v. *United States,* 302 U. S. 442, 444; *Reichelderfer* v. *Quinn,* 287 U. S. 315, 321. In granting to the Company for a consideration the right to sell the energy, the City has violated both the letter and the purpose of the Act.[8]

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[8] The City contends that application of section 6 of the Raker Act to sales by an agent is prevented by its alleged construction by government officials as forbidding sale of energy for resale and nothing more (Additional Br. in Opp. pp. 17, 18, 21–31). It is, however, submitted that the statute is unambiguous. If there were, however, any such ambiguity as to permit resort to administrative interpretations, it is clear that no such interpretations in this record support the City's position. Secretary Wilbur's letter of 1930 (R. 322) was absolutely noncommittal; and the ruling of Secretary Ickes in 1935 that the Act prohibited a sale of energy for resale (R. 247) gives rise to no implication that sales by an agent are not also prohibited. The same is true of the opinion of Solicitor Edwards in 1923. His suggestion as to the feasibility of an agreement for transmission of the City's power over privately owned lines (R. 234, 353–

Arguments based upon linguistic refinements of the statute add little to that based upon its rational intent. A very brief analysis of the phraseology, however, may be of assistance. The statute prohibits the City "from ever selling or letting" to any private corporation or individual "the right to sell or sublet the water or electric energy sold or given to it or him by the" City. The "selling" expressly [9] prohibited is not the selling of energy, but the selling of the right to sell energy.

The prohibition of the statute applies to the right to sell electric energy "given" to private corporations as well as energy "sold" to them. This phrase "sold or given" embraces every means by which electric energy can be supplied to a corporation. The word "given" as here used evidently refers to any transfer of possession. Cf. *State* v. *Bove*, 98 N. J. L. 350, 354 (1922); *Galloway* v. *Chatham R. R.*, 63 N. C. 147, 154 (1869); *Dresser* v. *Zabriskie*, 39 Atl. 1066, 1067 (N. J. Ch. 1898). It is immaterial whether title passes. Cf. *Smith* v. *Burnet*, 35 N. J. Eq. 314, 324 (1882). Concededly, the word was not used with the idea that the City

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354) has no bearing on the validity of a grant to an agent of the right to sell. The opinion of Acting Solicitor Wright in 1925 was not adopted by the Secretary, who merely wrote the Mayor deferring action pending the availability of further facts (R. 234–236).

[9] The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased.

would make donations of energy to private corporations, and to construe it as synonymous with "sold" would deprive it of any meaning. Hence, it is submitted that by using the word "give" Congress must have intended to prohibit sale of the right to sell energy transferred for distribution but not sold to the distributing agent.

It is thus apparent from the words and purpose of the statute that any contract by which the City for a consideration grants to a private corporation the right to sell Hetch Hetchy energy is forbidden, irrespective of whether title to the energy has also been transferred to the corporation.

The arrangement under the contract of July 1, 1925, plainly involves a grant by the City to the Company for a consideration of the right to sell Hetch Hetchy energy, irrespective of the transfer to the Company of title to the energy. Congress of course did not intend to prohibit the City from selling energy through its own employees. Rather, it intended that the City should do so and thus put its energy into competition with that of private corporations.[10] The issue thus resolves itself into the question whether the City has reduced or could reduce this great Pacific Coast power utility to the status of a mere employee. The Government sub-

[10] Furthermore, it may be that in selling energy through its own employees, the City would not be transferring to them a right to sell sufficiently partaking of the nature of a property right to be the subject of the "selling or letting" prohibited by the Act.

mits that an independent corporation dominating the power industry on the Pacific Coast could never be regarded as a mere employee of the City of San Francisco—certainly not for the purpose of evading the Act's objective to furnish competition to this very monopoly. But even if this were possible the Government submits that, far from making the Company its employee in this case, the City has for a consideration endowed it with a valuable contract right to sell the City's energy on the Company's account.

There can be no question but that the Company furnishes a valuable consideration for the privileges of sale which it enjoys. The contract requires it to accept and pay for a fixed minimum of energy each month (R. 84–85) and also to furnish peak load and steam stand-by services (R. 81). This is ample to support a sale. See *Speigle* v. *Meredith*, 22 Fed. Cas. No. 13,227 at p. 911 (C. C. Ind.); *Borland* v. *Nevada Bank*, 99 Cal. 89, 93 (1893); *Cole* v. *Laird*, 121 Iowa 146, 149 (1903); *Mansfield* v. *District, etc., Assoc.*, 154 Cal. 145, 147–148 (1908). In exchange for this consideration, fixed quite without relation to actual revenues (R. 163), the City has granted the Company a valuable contract right to sell the energy in its own way, on its own terms, and to its own advantage. This grant is a "selling" prohibited by the Act, and the question whether a right of sale can itself be the subject of a sale is settled, certainly for the purposes of this case, by

the statutory prohibition against sale of the right to sell, which necessarily implies that the mere right to sell may be sold within the meaning of the Act.

Even though the contract is terminable on one day's notice, it remains a valuable property right, *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251–252, and the Act as thoroughly forbids the sale of a right to sell for one day as for a hundred years.[11] The best proof of the value of the right is the fact that as actually enjoyed under the contract it has been so extensive as to make ludicrous by contrast the provision for termination. Years have passed and the Company has continued to exercise its valuable right of sale unchecked, and when the Secretary of the Interior felt compelled to insist on its termination, his efforts were continuously thwarted (R. 276–278) and even now are being stubbornly resisted at the bar of this Court. Thus for nearly fifteen years the very corporation whose monopolistic control of power the Raker Act was designed to check has been enjoying the right to sell Hetch Hetchy energy.

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[11] The further provision for immediate cancellation upon request of the Secretary of the Interior should he hold that the agreement violates any provision of the laws of the United States (R. 86) does not, of course, add anything to the provision for termination on twenty-four hours' notice. As a matter of fact, when the Secretary did find that the agreement violated the terms of the Raker Act (R. 230–269), the parties refused to invoke the cancellation provision and compelled him to institute this suit (R. 272–273).

The circuit court of appeals disposed of the Government's contention that the Act prohibits the Company from selling the energy as agent of the City in ten words: "Sale by an agent is the sale of the principal" (R. 674). This fiction is no reason for a conclusion that a sale by the Company in the instant case is a sale not by the Company but by the City within the meaning of the Raker Act. Cf. *Bank of America* v. *Whitney Bank*, 261 U. S. 171; O. W. Holmes, Jr., Agency (1891), 4 Harv. L. Rev. 345, 351. Congress did not legislate in terms of legal fictions. To hold that the Act does not prohibit these sales by the Company because in law they must be regarded as sales by the City and not by the Company is to employ a fiction to evade the plain purposes of the Act. When logic and the policy of a statute conflict with a fiction, the fiction must give way. *Blackstone* v. *Miller*, 188 U. S. 189, 206 (cf. *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204); *State* v. *Standard Oil Co.*, 49 Ohio St. 137 (1892); cf. *Helvering* v. *Hallock*, Nos. 110, 111, 112, 183, 399, this Term, decided Jan. 29, 1940.

II

THE CONTRACT OF JULY 1, 1925, IS A CONTRACT TO SELL ENERGY FOR RESALE AND AS SUCH IS WITHIN THE PROHIBITION OF THE RAKER ACT

Only if this Court is of the opinion that the prohibition of the statute extends solely to a contract of sale for resale, which respondent concedes is prohibited by the Act (Br. in Opp. to Cert. p. 15),

will it be necessary to consider the Government's contention that in any event the contract here involved is a contract of the City to sell energy to the Company and that the disposal of the City's energy to the Company thereunder is a sale for resale in violation of the Raker Act.

The true character of the contract is not determined by its mere form or by the name applied by the parties to it or to any act done under it. *Heryford* v. *Davis,* 102 U. S. 235, 243–244; *Kelley, Maus & Co.* v. *Sibley,* 137 Fed. 586, 591 (C. C. A. 7). There is no magic in the use by the parties of the words "consignment" or "agency." *In re United States Electrical Supply Co.,* 2 F. 2d 378–380 (S. D. Ill.); *D. M. Ferry & Co.* v. *Hall,* 188 Ala. 178, 186–187 (1914). The true legal effect of the instrument is to be gathered from the real nature of the transactions authorized or contemplated by its terms. *O'Brien* v. *Miller,* 168 U. S. 287, 297; *Green County* v. *Quinlan,* 211 U. S. 582, 594.[12]

[12] The circuit court of appeals said in its opinion: "Although the mere terminology used in a contract will not necessarily determine its character, the court should give effect to the express intent of the parties unless the electric energy is actually sold to the Company." It is no doubt a general principle of law that where no public interest is involved and the parties have a legitimate end in view, their written instruments are to be construed if possible to effectuate their intent. But where, as here, the parties use terms to avoid the requirements of the law, no principle requires a construction favorable to the effectuation of such terms. On the contrary, it is the plain duty of the courts to give full effect to the congressional policy embodied in the legis-

In determining what the real nature of the agreement is, all phases of the relationship should be viewed as a whole rather than merely analyzed *seriatim* to test whether they indicate a contract of sale or one of agency. *Ludvigh* v. *American Woolen Co.*, 231 U. S. 522, 528; *Heryford* v. *Davis*, 102 U. S. 235, 243–244. If the analysis of the entire relationship shows that the energy is sold to the Company under the contract, the transaction is concededly prohibited by section 6 (Br. in Opp., p. 15). The Government contends and the trial court found (Finding X, R. 164–165) that there was such a sale. The evidentiary findings were amply supported by the evidence and were not questioned by the circuit court of appeals (R. 161–166, 668–674). It is submitted that the circuit court of appeals erred in holding that under the facts found the agreement was as a matter of law one of agency.

1. *The Company does not account for the proceeds of energy sold, but pays a price for energy bought.*—Probably the most significant element to be determined is whether the obligation which the Company assumes under the contract is to pay a

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lation sought to be evaded, and the transactions of the parties should be viewed in the light of the statutory purpose rather than from the standpoint of effectuating avoidance of the statute if possible. *Higgins* v. *Smith*, No. 146, this Term, decided Jan. 8, 1940; *Gregory* v. *Helvering*, 293 U. S. 465; *Horning* v. *District of Columbia*, 254 U. S. 135, 137.

price for the energy received by it or available for delivery to it, or whether its obligation is merely to make an accounting to the City for the proceeds received from the sale of the energy. See 1 Mechem, Sales (1901) sec. 43, pp. 41–42. If, as the Government contends, the obligation is to pay a price, this factor is virtually conclusive of the existence of a sale. Cf. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Howard* v. *Hancock Oil Co.*, 68 F. 2d 694, 698 (C. C. A. 9); *In re Leflys*, 229 Fed. 695 (C. C. A. 7); *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re Rabenau*, 118 Fed. 471 (W. D. Mo.); *In re Wood*, 140 Fed. 964 (M. D. Pa.).

Under the contract the proceeds of the sale to the consumers belong to the Company without duty to account therefor (R. 164). This not only shows that the Company did not act as agent in collecting revenues, but further indicates that the contract was one of sale. *In re Linforth*, 15 Fed. Cas. No. 8,369 at 560 (C. C. Cal.); *Nutter* v. *Wheeler*, 18 Fed. Cas. No. 10,384 at 499 (Mass.); *Arbuckle* v. *Gates & Brown*, 95 Va. 802, 805 (1898); *Arbuckle Bros.* v. *Kirkpatrick*, 98 Tenn. 221, 250 (1897); *Aetna Powder Company* v. *Hildebrand*, 137 Ind. 462, 470 (1893); see 1 Mechem, Sales (1901) sec. 43.

The obligation of the Company is not to account for the proceeds of the sale but to pay a fixed price (R. 163). The contract provides a general formula involving three factors for determination of the

amount per kilowatt-hour to be paid the City. The agreement is that the Company shall pay to the City 26.935 percent of 2.383 cents per kilowatt-hour for 76 percent of the energy delivered by the City at Newark (Par. 5, R. 83), and that payment shall be made in monthly instalments (Par. 7, R. 84). In the first place, it is to be noted that on its face the formula demonstrates that the price received by the City is largely unrelated to the price received by the Company from the consumers. The two percentage factors are fixed and the 2.383 cents per kilowatt-hour, the average net revenue per kilowatt-hour of the Company in 1924 (R. 83), obviously becomes an arbitrary figure when used for later years. Even under the same prevailing rates the average unit revenue in later years might vary as the result of shifts in the relative proportion of energy sold at different rate brackets.[13] There is, therefore, no necessary relation between the average amount per unit received by the Company and the amount per unit paid to the City. Neither is there any fixed relation between the average revenue per unit and the amount which the City contends is retained by the Company merely as compensation for services. This amount is fixed at 73.065 percent of 2.383 cents regardless of any

[13] Users of great quantities of energy pay a lower rate per kilowatt-hour than smaller consumers. Thus an expansion of industry would lower the average revenue per kilowatt-hour, and an expansion of domestic consumption would have the opposite effect (R. 297).

increase or decrease in actual average revenue per unit. The Company, therefore, does not account to the City for the proceeds of the retail sales, but becomes obligated on a fixed day each month to pay a fixed price for the energy received by it or available for delivery to it.[14]

The fact that the contract in terms provides that the amounts to be retained by the parties shall be proportionately increased or decreased "should the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority" (Par. 8, R. 85), does not render the obligation assumed by the Company one to account for the proceeds merely. In the first place, the sliding scale provided does not change according to the average revenue per kilo-

[14] It should also be noted that even if the contract may properly be regarded as making the delivery at Newark a consignment, nevertheless such a relationship may change in its legal nature during the course of the transaction. And when, as here, the consignee is permitted to sell on such terms as he pleases and is bound, whether he sells or not, to pay the consignor at a fixed time a fixed price, a sale by him of any part of the consigned goods becomes in effect a purchase and resale of that part. *Mitchell Wagon Co.* v. *Poole*, 235 Fed. 817, 820 (C. C. A. 6); *In re Chalmers*, 206 Fed. 143, 144 (Mont.). Under such circumstances, it is held that the proceeds of sales by the consignee do not belong to the consignor, who becomes a mere creditor of the consignee at the time of sale to the third person. *Ex parte White*, L. R. 6 Ch. App. 397, 403–405 (1870); *Nutter* v. *Wheeler*, 18 Fed. Cas. No. 10,384, pp. 499–500 (Mass.); *Aetna Powder Company* v. *Hildebrand*, 137 Ind. 462, 468–471 (1893); *Vermont Marble Co.* v. *Brow*, 109 Cal. 236, 240 (1895).

watt-hour, but according to the "established rates for the sale of electric energy in San Francisco." The average revenue per kilowatt-hour may or may not change according to a fluctuation in the rates because of possible shifts in relative proportions of energy sold at different prices in commercial and domestic rate brackets (R. 297) (see fn. 13, *supra*). At best the price the City receives can be said to be based only upon a prediction of what the Company would receive, and such a prediction is one of the elements affecting the determination of practically every wholesale price.

It is further to be noted that the provisions of this paragraph were never observed. Rate reductions decreased the net revenue of the company from 2.383 cents per kilowatt-hour in 1924 to 2.361 cents in 1935, 2.238 cents in 1936, and 2.113 cents in 1937, representing decreases below the average rate of return fixed in the contract of 1, 6, and 11 percent, respectively (R. 296–297), but there was no change in the compensation paid to the City (R. 288–290).[15] Thus, as would any other contract

[15] Plainly without significance is the estimate that over the twelve-year period 1925–1937, the City received $26,000 more than it would have received if the return to it had been based on the twelve-year average revenue (R. 299). The calculation merely supports the view of the district court that before the rates were lowered, the Company was collecting more than its contract share of the income from consumers (R. 112) and hence was reaping a profit over and above its contract share asserted by the City to be a "reasonable charge for such service and the use of such corporation's facilities" (R. 64).

vendee, the Company alone bore the loss incident to reduction in market price to the ultimate consumer. A fixed price was contemplated and paid.[16]

2. *The Company sells Hetch Hetchy energy to the City.*—Among many other elements which indicate sale rather than agency is the fact that the Company sells to the City energy which in part originates at Hetch Hetchy and at a price which has no relation to the terms of the contract. The respondent's insistence on a mere agency relation thus necessarily involves the contention that the City through an agent sells Hetch Hetchy energy to itself. To the extent that the 73.065 percent retained by the Company represents compensation for its services in selling under the respondent's theory, the Company is charging the City for selling energy to itself. The suggestion of the circuit court of appeals that this was a practical method

[16] This is only one of the features which distinguish this case from *Los Angeles G. & E. Corp.* v. *Los Angeles*, 188 Cal. 307 (1922), cited by respondent as involving a similar contract (Br. in Opp., p. 12). In that case the contract provided that the companies should collect the money for electric energy supplied to consumers and pay to the City "daily as collected all sums collected," less certain sums to be retained by the companies for keeping the distributing systems in repair and to be applied on the purchase price of the plants which it was contemplated the City should purchase from the companies. Perhaps of even greater significance is the fact that the entire conduct of the business under the contract in that case was subject to the supervision and approval of a board upon which the City and the companies were equally represented. See p. 316, recognizing the distinctions which make the contract in the principal case one of sale.

for arriving at the compensation to be paid the Company for transmission and use of its facilities (R. 673) is plainly wrong. The City purchases its energy for municipal purposes at regularly published schedules, and there is no showing that these schedules are fixed with any relation to the price which the Company pays under the contract for energy from Hetch Hetchy. It seems clear, moreover—at least there is no showing to the contrary—that the rate base for the municipal schedule includes an allowance for the cost of generation in, and transmission from the Company's own numerous plants.[17]

3. *The Company fails to segregate revenues derived from Hetch Hetchy energy.*—Again, the failure of the contract to require or of the Company otherwise to provide for a segregation or other apportionment of any of the funds collected by it, part of which under the theory of agency belong to the City, further indicates that the Company is a purchaser and reinforces the inference of sale arising from the other provisions. *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re United States Electrical Supply Co.*, 2 F. 2d 378, 380 (S. D. Ill.); *In re Leflys*, 229 Fed. 695, 697 (C. C. A. 7). See 1

[17] Moreover, the report of the City's chief valuation and rate engineer shows that in the 73.065 percent fixed in the contract as payable to the Company there is included an item for Uncollectible Reserves (R. 435), which means "uncollectible accounts." Thus, under the City's theory of agency, the City as principal is required to make an allowance to the Company as agent for the assumption by it of the risk of loss on an account owed by the City to itself.

Mechem, Agency (2d ed., 1914), sec. 1335; *Lance* v. *Butler*, 135 N. C. 419, 422 (1904).

4. *The Company names itself as sole creditor in bills to consumers.*—Aside from the fact that the City's theory involves the violent assumption that the Company acquiesced in becoming an agent for the sale of energy to those whose custom it formerly enjoyed as vendor, the practice of the Company in naming itself as the sole creditor in bills to consumers (R. 164) amounts to a holding out of the Company as the owner, ordinarily considered an earmark of sale. *In re Wayside Furniture Co.*, 67 F. 2d 201, 202 (C. C. A. 7); *D. M. Ferry & Co.* v. *Hall*, 188 Ala. 178, 190 (1914); see *In re Caldwell Machinery Co.*, 215 Fed. 428, 430 (W. D. Wash.).

5. *The Company is not subject to the City's direction in the fixing of rates to consumers.*—When prices to consumers are not set by the alleged principal, the transaction is normally one of sale. *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re United States Electrical Supply Co.*, 2 F. 2d 378, 383 (S. D. Ill.); *In re Leflys*, 229 Fed. 695, 697 (C. C. A. 7); *In re Linforth*, 15 Fed. Cas. No. 8,369 at 560 (C. C. Cal.); *In re Wayside Furniture Co.*, 67 F. 2d 201, 202 (C. C. A. 7); *Chickering* v. *Bastress*, 130 Ill. 206 (1889). In the instant case, if the Company were acting as agent for the City, the City would fix its rates, but the City placed no limitation on the prices which the Company might charge to consumers, except that they should not exceed the lawfully established rates (R. 81). In

doing this, the City abdicated its otherwise unfettered power under the state constitution to fix the rates without regard to those established by the State Railroad Commission (R. 163). The trial court properly deemed this feature of the relationship indicative of a sale (R. 115–116).

6. *The Company has complete control of the energy.*—The contract plainly reserves no power of control in the City over the distribution of the energy (R. 161). The record shows that the amount of energy drawn from the Moccasin plant to be marketed by the Company is exclusively under the control of the load dispatcher of the Company (R. 283–284, 302–303). It is the City which is agent of the Company for the purpose of generating the energy. The City's lack of control is not only physical but complete.

The court below said that the Company's control is only over distribution of the energy, and that since distribution of the energy occurs simultaneously with its delivery to the Company the element of control is unimportant (R. 670). Since the Company's dispatcher controls the amount of energy drawn from the City's plant at any given time, the Company's control is not strictly limited to distribution. Nor is it material that the interval of time occupied by distribution is infinitesimal. The control of the Company's load dispatcher is not altered merely because electricity travels 186,000 miles per second. It is well settled that

power of control in the transferee indicates that title has passed. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 354; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 499; *In re Wood*, 140 Fed. 964 (M. D. Pa.); *D. M. Ferry & Co.* v. *Hall*, 188 Ala. 178, 184, 190–191 (1914); *Mennis* v. *Manning & Co.*, 136 Ill. App. 406, 409 (1907); *Norwegian Plow Co.* v. *Clark*, 102 Iowa 31, 40 (1897); *Chickering* v. *Bastress*, 130 Ill. 206, 216 (1889). See 1 Restatement, Agency (1933) sec. 1; sec. 1, coms. a and b; sec. 14; and sec. 14, com. b.[18]

7. *The company bears the risk of loss.*—It is the Company and not the City, under this contract, which bears the risk of loss. It is well recognized by the cases that the risk of loss accompanies title to the goods in the absence of a contrary expressed intention. *Coweta Fertilizer Co.* v. *Brown*, 163 Fed. 162, 165 (C. C. A. 6); *In re Rabenau*, 118 Fed. 471, 477 (W. D. Mo.); *Wood M. & R. Co.* v. *Brooke*, 30 Fed. Cas. No. 17,980 at 515 (Ore.); *Arbuckle Bros.* v. *Kirkpatrick*, 98 Tenn. 221, 251 (1897); see

[18] The City argues that because the contract is terminable on one day's notice, ultimate control is reposed in the City, but it must be conceded that until termination occurs, the control continues in the Company. The arrangement which has thus persisted for fifteen years and the right to continue which indefinitely the City is now defending at the bar of this Court, marks as a sale all disposition of energy under the contract to date; and the sales character of such disposition would not be affected by any termination which might hereafter occur. It is on the basis of the past and present dispositions that this suit is presented for adjudication.

Donlan v. *Turner, Dennis & Lowry Lumber Co.*, 282 Fed. 421, 424–425 (C. C. A. 9); *The Elgee Cotton Cases*, 22 Wall. 180, 194; 4 Williston, Contracts (Rev. ed. 1936) secs. 962, 963.[19]

Even if no one of the above factors was sufficient by itself to characterize the contract as one of sale, which is not conceded, it is submitted that the combination of so many factors pointing in the same direction compels the conclusion that the City is selling its energy to the Company for resale to consumers in violation of the conceded prohibition of the Raker Act.

CONCLUSION

The important question in this case is whether the City, by transferring to the Company for a consideration the right to sell Hetch Hetchy energy is violating the Raker Act. For the reasons set forth in Point I, the United States submits that this is exactly what the City is doing and that it is exactly what the statute forbids it to do. The question whether title to the energy is transferred to

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[19] The deduction of 24 percent of the energy delivered at Newark is, as the court below held, without bearing, since it was computed on average loss (R. 671). A certain measurable amount of electric energy is always necessarily consumed as an incident of its transmission (R. 432–434); cf *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190. The 24 percent deduction was inserted in the contract to provide for this factor and bore no relation to and provided no deduction for the actual physical loss which might arise from fortuitous causes, such as accident or theft.

the Company is entirely immaterial where, as here, the right to sell is transferred. If it were material, however, the contract, when considered as a whole and in connection with the action of the parties under it, clearly shows a sale of the energy to the Company. In either event, the statute is being violated and the City has resisted all attempts of the Government to obtain its observance. For this reason, the United States is now entitled to have its violation enjoined. Raker Act, sec. 9 (*u*) (R. 35); *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393. Hence, it is respectfully submitted that the decree of the circuit court of appeals should be reversed.

FRANCIS BIDDLE,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
WILLIAM D. DONNELLY,
Special Assistant to the Attorney General.
LAWRENCE S. APSEY,
ROBERT H. FABIAN,
Attorneys, Department of Justice,
Washington, D. C.

FREDERIC L. KIRGIS,
First Assistant Solicitor,
Department of the Interior.

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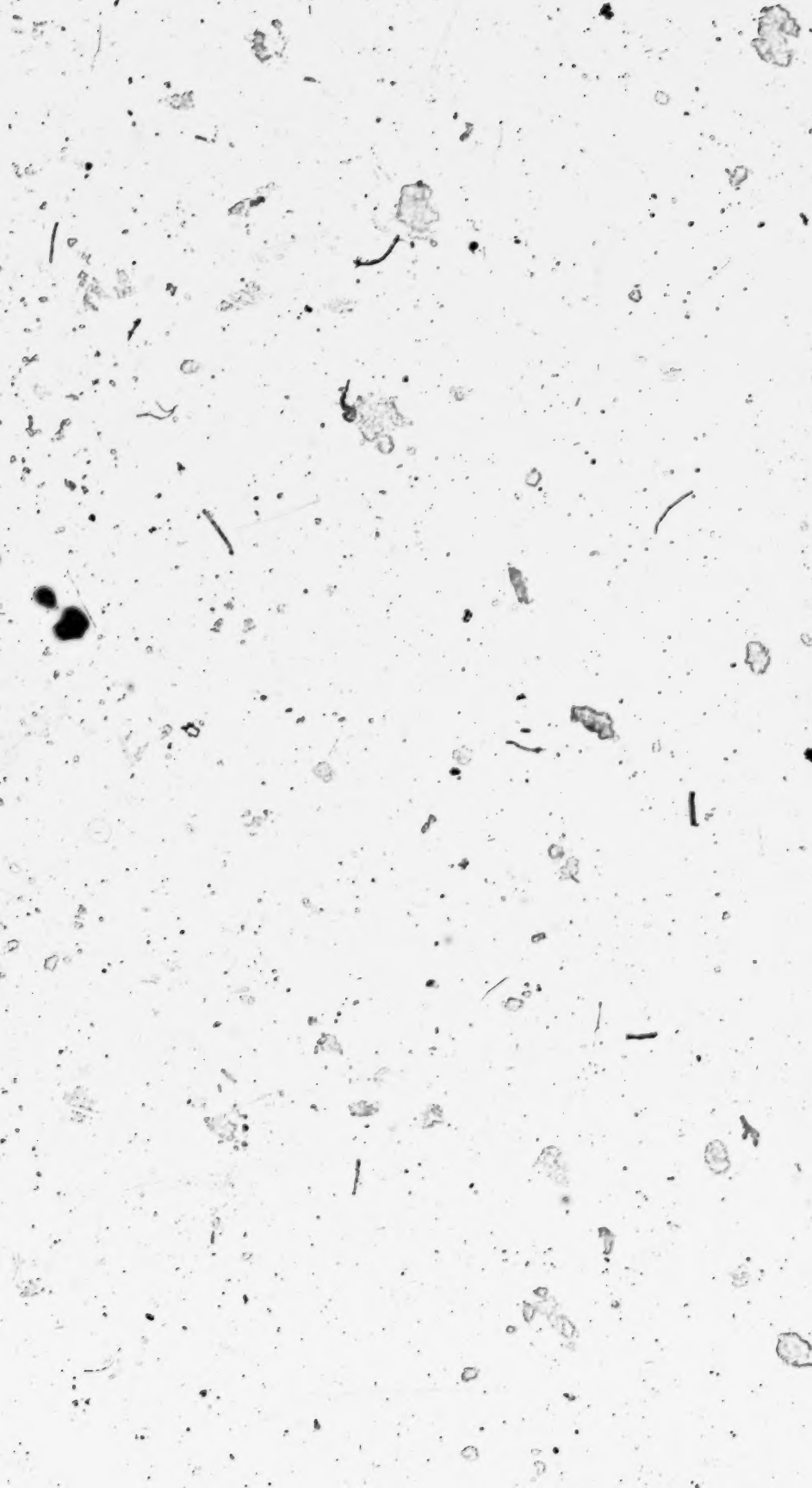

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No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SECTION 6 OF THE RAKER ACT IS A CONSTITUTIONAL EXERCISE OF THE LAW-MAKING POWER OF CONGRESS AND AS A LAW ITS ENFORCEABILITY IS IN NO WAY AFFECTED BY THE EQUITABLE DEFENSES ASSERTED BY THE RESPONDENT

In addition to the argument on the two points raised in the Government's main brief, the respondent raises a further question. It is asserted that Section 6, regarded as a statute, is unconstitutional, is not an exercise of the law-making power, and, therefore, must be considered only as a covenant in a contract to which the city assented (Br. 177, 181). Upon this premise it is urged that certain equitable defenses make the covenant unen-

forceable.[1] The premise is obviously fallacious and with it falls the argument founded upon it.

1. *Section 6 of the Raker Act is constitutional.*—Congress has the absolute and unlimited power to prescribe the conditions and the mode by which interests in the public lands shall be transferred.[2]

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[1] For the assistance of the Court the arrangement of the briefs may be described: Respondent's first and second points (Br. 54–56, 56–58) are so frivolous as to make discussion unnecessary. Respondent apparently addresses its points 4–9, 14 and 15 (Br. 58–109, 165–176) to the Government's first argument in the main brief. Respondent's points 10–13 (Br. 109–165) are addressed to the Government's second argument. Respondent's point 16 (Br. 177–187) and, indirectly, point 17 (Br. 188–197) are treated in this reply brief.

Respondent bases no argument upon its repeated assertion as to tardiness of the United States in making its contention that the statute prohibits an agency agreement as well as one to sell energy for resale (Br. 12–22, 96–97) but concedes that the question is here presented for decision (Br. 30). Indeed, it could not do otherwise since this contention was advanced by reply brief in the district court filed February 26, 1938, long prior to the argument on March 22, 1938, and was treated below as within the issues (R. 420, 666, 674; Br. 20, 23). *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 97; *Wasatch Mining Co.* v. *Crescent Mining Co.*, 148 U. S. 293, 299–300; *Martin* v. *Ambrie*, 262 Fed. 44, 46–47.

[2] The constitutionality of Section 6 may here be rested not only on the power of Congress to impose conditions on the disposition of public lands but also on its power to regulate them, since the United States retains rights of reverter in the lands granted by the Raker Act. As the Secretary of the Interior has specifically held, the Raker Act granted to the City only a determinable fee. 53 L. D. 425. *Rio Grande Western Railway Company* v. *Stringham*, 239 U. S. 44, 47; *Kern River Co.* v. *United States*, 257 U. S. 147, 152–154.

U. S. Const., Art. IV, sec. 3, cl. 2; *Gibson* v. *Chouteau*, 13 Wall. 92, 99. Thus it may restrict alienation of public lands after their conveyance to homesteaders. *Ruddy* v. *Rossi*, 248 U. S. 104. And in granting lands it may impose restrictions and regulations as to the manner of their subsequent disposal. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 421–422. The power in Congress includes a power as to its property analogous to the police power. Thus, for protection of public lands it may regulate the use made by individuals of private lands. *Camfield* v. *United States*, 167 U. S. 518, 525–526; *United States* v. *Alford*, 274 U. S. 264, 267; cf. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404–405; *McKelvey* v. *United States*, 260 U. S. 353. Indeed, the United States in granting rights in its lands to States may even impose conditions unrelated to the rights granted. *Arizona* v. *California*, 283 U. S. 423, 450, 464. Congress, of course, has power to adopt all means reasonably necessary to effectuate any of the purposes for which the Federal Government was created and this includes authority to regulate contracts of private individuals or of a state. *Frisbie* v. *United States*, 157 U. S. 160, 165; *Calhoun* v. *Massie*, 253 U. S. 170, 175; *New York* v. *United States*, 257 U. S. 591, 601; *Highland* v. *Russell Car Co.*, 279 U. S. 253, 261. It follows that in the exercise of its authority over public lands Congress may regulate contracts so far as they contemplate the use of such lands. See *Stephenson* v.

Binford, 287 U. S. 251, 274–275. So here, Congress in granting rights-of-way over its lands and the right to use other portions of such lands for reservoir and power-development purposes was fully authorized as a condition to the grant of such rights under the Raker Act, to prohibit by Section 6 the contract here in question.

2. *Respondent is estopped to deny the constitutionality of Section 6.*—Since the City has accepted and is presently utilizing and enjoying the substantial rights, privileges and benefits conferred by the Raker Act, under well-established principles it is now estopped from contesting the constitutionality of a provision in the Act which qualifies and limits the rights granted to the City. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17, 29; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S. 469; *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208, 211; *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. 2d 573 (C. C. A. 8), certiorari denied, 291 U. S. 672.

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[3] The respondent argues (Br. 38, 195–196) that the water and water rights involved in the Hetch Hetchy project were acquired under the laws of California and not from the United States. The references in the record to water appropriations by the City (R. 445–447) plainly relate only to filings, and mere filings do not perfect title. *Inyo Consolidated Water Co.* v. *Jess*, 161 Cal. 516 (1911); 46 I. D. 89, 95–96.

Whether the right to appropriate waters on the public lands of the United States deraigns from the United States

3. *Section 6 is to be given effect as a statute.*— The language quoted by the respondent from *United States* v. *Midwest Oil Co.*, 236 U. S. 459, and *Butte City Water Co.* v. *Baker*, 196 U. S. 119 (Br. 177), plainly fails to negative the well-settled rule that every act of Congress making a grant of the public lands is properly to be given effect both as a law and as a conveyance. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 415, 427, 435; *Wisconsin Central R'd Co.* v. *Forsythe*, 159 U. S. 46, 55; *United States* v. *Denver &c. Railway*, 150 U. S. 1, 14; *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 625; *Missouri, etc. Ry. Co.* v. *Kansas Ry. Co.*, 97 U. S. 491. This rule is not limited to any particular type of grant, but applies whether the grant be to a railroad, *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 422; to a settler who has made a homestead entry, *Hall* v. *Russell*, 101 U. S. 503, 509; or to a state, *United States* v. *Southern Oregon Co.*, 225 Fed. 560, 568 (Ore.).

Neither is there any merit in the attempted distinction of the *Oregon & Cal. R. R.* case, *supra*,

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as owner of such waters, *California Power Co.* v. *Beaver Cement Co.*, 295 U. S. 142, 162; *Lux* v. *Haggin*, 69 Cal. 255, 336 (1886); or from the state, no rights in the water on the lands of the Park or Forest could be acquired either by purchase or appropriation until the City had received permission to build and had completed the works essential to the diversion and application of the water to beneficial use. *Silver Lake etc. Co.* v. *Los Angeles*, 176 Cal. 96, 103–104 (1917). The City could not, therefore, have perfected any water rights prior to the passage of the Raker Act and the construction of necessary diversion works.

on the ground that the statute there involved was held to be such only because passed "for a national purpose" (Br. 178). The national purposes were there considered, not in determining the character of the statute as law, but in ascertaining whether its provisions should be enforced by forfeiture.

4. *Since Section 6 is a valid Federal statute, its requirements cannot be defeated by defenses urged by respondent as effective against the enforcement of mere contract rights.*—The objection that enforcement of the Raker Act will tend to restrain trade (Br. 183) has no merit. Obviously, the general policy against restraint of trade cannot defeat the specific and paramount policy for the prevention of monopoly expressed by Congress in Section 6. This is the ultimate expression of public policy applicable to this case. *Borgnis* v. *Falk Co.*, 147 Wis. 327 (1911); *Vidal* v. *Girard's Executors*, 2 How. 126, 197; see *United States* v. *Belmont*, 301 U. S. 324, 331, 332. It is also plain that state law against unreasonable restraints on alienation invoked by respondent (Br. 183) is ineffective to limit restrictions imposed in grants by the United States. Cf. *Bunch* v. *Cole*, 263 U. S. 250, 253–254; *Sunderland* v. *United States*, 266 U. S. 226, 233. Furthermore, the rule in question is directed against restraints on the alienation of a fee simple. See 3 Thompson, Real Property (1924) sec. 2007, p. 95. This restraint, as to sale of energy, is but a restriction as to the use of the granted lands. Such restrictions as to use, even though general, are

valid. *Los Angeles Investment Co.* v. *Gary*, 181 Cal. 680 (1919).

Respondent argues (Br. 186) that the injunction should not be granted because to grant it would be to deprive the city of an annual revenue of $2,200,000. This argument is strange to the law. It is but to say that violation of the law (or breach of the contract) is to be excused because respondent may suffer a monetary loss from its enforcement. Furthermore, the City does not show that it could not secure an equal or even greater revenue from some other mode of disposition of the energy.

In answer to the respondent's inference (Br. 197) that it is necessary for the United States to have a "balance of equities" in its favor in order to procure the relief asked, it is to be noted that the protection of the public interest by the enforcement of a statute is sufficient to outweigh any outstanding "equities". *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 427.

Respondent contends that noncompliance with the prohibition of Section 6 is excused by legal impossibility, in that its voters will not provide for the raising of funds with which to purchase distribution facilities. The defense of impossibility is not available in a suit brought to enforce a statute. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393. Furthermore, the so-called impossibility is purely subjective. That is, the City, through its voters, has said "we will not do it" rather than "it cannot be done." This type of

impossibility cannot excuse performance. See Williston, Contracts (Rev. ed. 1938) sec. 1932, p. 5411. Finally, there obviously can be no impossibility of compliance where, as here, the obligation imposed is a negative one, a mere prohibition.

CONCLUSION

Since the respondent persists in violating section 6 of the Raker Act, its enforcement through court action by the Attorney General at the request of the Secretary of the Interior becomes a duty under the express provisions of section 9 (u) of the Act. Injunction is obviously the appropriate means for such enforcement and is therefore authorized by the Act. The so-called secondary defenses are all without merit, and the judgment of the circuit court of appeals should be reversed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

WILLIAM D. DONNELLY,
Special Assistant to the Attorney General.

LAWRENCE S. APSEY,
ROBERT H. FABIAN,
Attorneys, Department of Justice,
Washington, D. C.

FREDERIC L. KIRGIS,
First Assistant Solicitor,
Department of the Interior.

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In the Supreme Court

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United States

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OCTOBER TERM, 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO
(a municipal corporation),
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN J. O'TOOLE,
City Attorney
of the City and County of San Francisco,
DION R. HOLM,
Assistant City Attorney
of the City and County of San Francisco,
City Hall, San Francisco, California,
Attorneys for Respondent.

ROBERT M. SEARLS,
Standard Oil Building, San Francisco, California,
Of Counsel.

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(a municipal corporation),
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

The City and County of San Francisco herewith replies to the petition for writ of certiorari filed by the Solicitor General on behalf of the United States in the above entitled matter, and prays that said petition be denied.

QUESTIONS PRESENTED.

The City does not accede to the Government's description of the contract involved in the case, nor does it agree that under the contract the Pacific Gas and Electric Company bears the risk of loss of energy delivered to it or is obligated to pay the City at a price fixed without regard to the price the Company receives from the consumers for all energy delivered or available for delivery under the contract. Nevertheless, we shall of course direct this reply to the questions as stated by the Government, although we do not consider that they are correctly stated.[1]

STATUTE INVOLVED.

The Government has quoted only one portion of the Raker Act of December 19, 1913—Section 6. This clause should be read in conjunction with the following additional provisions of Sections 9 and 11:

> "*Sec. 6.* That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

---

[1] The Government's statement of the first question recites that the effect of the agreement is to "grant to the Company" the right to sell energy. The word "grant" used in this connection is deceiving in that one who employs an agent to sell anything for his account in a sense grants him the right to sell it, but the word "grant" as used in law implies some form of a conveyance of title or a property right of some sort. There is no suggestion in the contract that the Company has any property right in the energy at all. A fair description of the effect of the contract would be to say that it employs the Company to sell and distribute energy as the City's agent and for the City's account.

Section 9:

"(1) * * * Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, *after which it may dispose of any excess electrical energy for commercial purposes.*"[2]

* * * * * * *

"(m) * * * The said grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, *at prices to be fixed under the laws of California* or, in the absence of such laws, at prices approved by the Secretary of the Interior, *sell or supply such power for irrigation, pumping, or other beneficial use,* * * *".

* * * * * * *

"*Sec. 11.* That this Act is a grant upon certain express conditions specifically set forth herein, and *nothing herein contained shall be construed as affect-*

[2]Italics used in this reply have been supplied by the writers unless otherwise noted.

ing or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

STATEMENT.

Rulings of the courts below.

A fair consideration of the Government's petition requires that the statement of facts set forth therein be criticised and supplemented. The District Court did *not* hold that Section 6 of the Raker Act prohibited an agency contract. The court said (R. 120-121) that electric energy was a peculiar kind of property, and that it might be difficult to draw an agency agreement for its disposal. But it did not hold that if the agreement in question is an agency agreement it is prohibited by Section 6 of the Raker Act.

There was no dissent in the Circuit Court of Appeals. While three judges heard the argument, one of them (Judge Denman) deemed himself disqualified, subsequent to submission, and did not participate in consideration or decision of the case (R. 677). The Government is therefore asking the Supreme Court to pass on a question which was not decided by the District Court, and which was unanimously decided by the Circuit Court of Appeals adversely to the Government's contention. The latter court said (R. 674):

"The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal."

THE FACTS.

The Government's statement of facts we feel gives the court an entirely inadequate picture of the situation. After enactment of the Raker Act in 1913 the City proceeded to build the Hetch Hetchy project and expended some $89,600,000 in its construction (R. 373. Stricken out, 453). The only use made of the public lands granted to the City, in so far as this case is concerned, was to furnish a part of the main storage reservoir site, the diversion dam site, and part of the tunnel aqueduct through which the waters were carried to the City's power plant on Moccasin Creek in the Sierra Nevada Mountains (R. 305—Defdts. Map Exh. A). This power house and the transmission line leading from the same across the San Joaquin Valley to Newark (35 miles southeast from San Francisco (R. 161)), was located and constructed entirely on patented lands acquired from private persons by the City (Defdts. Map Exh. A). The right to divert and use the waters of the Tuolumne River in the generation of power at the Moccasin Creek plant was acquired entirely under the laws of the State of California (Offers of proof, R. 444-447—Rejected), and

the Raker Act (Section 11, *supra*) expressly disavows any attempt on the part of Congress to interfere with the application of those laws. There was, it is true, a small construction power plant near the head-works of the project, known as the Early Intake plant, which was situated entirely on Government land, and which was designed primarily to furnish power for construction purposes (R. 411). Some surplus energy was developed at this plant and transmitted to the Moccasin plant, where it was added to the output of that plant, amounting in quantity to less than 3 per cent of the total output of the Moccasin plant (R. 281). Therefore 97.1 per cent of the energy affected by the contract in question is generated by the City in a power plant constructed entirely on its own property, not acquired from the Government, with water appropriated under the laws of the State of California, not under the Raker Act, although this water is stored in part and transmitted, in part on and over lands granted under the Act. The value of the lands granted to the City by the Government was $244,139.75 (R. 315), whereas the City has delivered to the Government lands and rental payments in exchange aggregating $2,702,607 in value (R. 326).[3]

The City has no publicly owned distribution system of its own, had none at the time the Raker Act was enacted, and made no representations whatever to Congress that it would acquire or own a municipal distribution system. Indeed, at the time the Raker Act was passed the City's plans contemplated the utilization of the electric energy to be generated at the Moccasin power plant for pumping

[3]This testimony was later stricken out on the Government's motion (R. 559-561).

its water supply over the Coast Range Mountains. Later on it was learned from engineering investigation that the Coast Range could be successfully tunneled and the water delivered to San Francisco by gravity flow. It resulted that the greater part of the Moccasin power plant output which it had been believed when the Raker Act was under consideration by Congress would be required for pumping water over the Coast Range became available for other uses and subject to disposal under the other provisions of the Act.[1] Congress in Sections 9(m) (n) and (o) of the Act, dealing with the City's disposal of surplus energy, did not even suggest that it must be made through a publicly owned distribution system.

There were two alternative methods by which it was physically possible to distribute the energy which the terms of the Raker Act required the City to generate and dispose of as a part of the Hetch Hetchy water supply project. One would be to build or acquire a publicly owned distribution system; the other would be to enter into some contractual arrangement, not within the prohibition of Section 6 of the Raker Act, by which this energy could be transmitted and delivered to the people of the City, as contemplated by the Act. While the City's municipal charter provides for the gradual acquisition and ultimate ownership by the City of its public utilities (R. 664), its electorate no less than seven times refused to authorize the necessary financing for the acquisition or

[1] The above facts were set forth in the City's offer of proof (R. 424-426), but the trial court excluded the testimony as irrelevant (R. 428). The Circuit Court of Appeals assumed the facts to be either proven or provable (R. 665).

construction of a public distribution system (R. 377—Defdts. Exh. G—not admitted), and the City was and is by force of circumstances, required to utilize the second alternative until its electorate authorizes it to finance the acquisition of a publicly owned system. This alternative of an agency contract was suggested at least two years before the signing of the contract involved by the then Solicitor of the Department of the Interior (R. 352-354) in dealing with surplus power sales from the small Early Intake plant. Following receipt of these views from the Solicitor of the Department of the Interior in 1923, two years later and upon completion of its Moccasin Plant, the City entered into the contract in question. At the time of making this contract the City was faced with the situation that the consumers' demand for electric energy in San Francisco, particularly during peak hours, was in excess of the maximum output of its power plant (R. 291). It was therefore absolutely necessary that the energy to be delivered from the Moccasin plant be supplemented by energy generated by the Pacific Gas and Electric Company, and that the latter company also furnish adequate standby service to protect the consumers in the event of interruption due to storms, plant breakdowns, etc. It was impossible to segregate a portion of the Company's distribution system under the contract and say that certain parts of its distribution facilities should be utilized solely for transmission and distribution of the City's energy. They had to be tied in also with the lines bringing energy from the Company's generating plants in order that the City's delivery might be properly supplemented to meet consumers' demands. Recognition of these facts

is essential to an understanding of the provisions of the contract (R. 6 [redacted]).

The parties to the contract then proceeded to ascertain certain actual operating facts as a basis for their agreement. These included the average load factor of the San Francisco system, the actual average transmission and distribution losses between the terminus of the City's transmission line at Newark and the consumers' meters in San Francisco, and the average revenues received by the Company under rates prescribed by the California Railroad Commission for all energy distributed in the San Francisco territory (R. 431-436). They also ascertained the Company's cost of distribution, including a fair return to it based on the value of its distribution system. The parties then executed the contract of July 1, 1925, which requires the Company to accept for delivery at a 75% load factor all of the energy output of the Moccasin plant (which was always less than the total consumers' demand in San Francisco), to subtract from that 24 per cent of the total energy delivered, representing actually experienced distribution losses, and to distribute, meter, and collect the standard rates for the rest of it (that is, 76 per cent), furnishing required standby service and additional energy required; and to account for the proceeds.

The proceeds to be accounted for were obtained by multiplying the quantity of energy delivered by the City at Newark (less 24 per cent) by the average return per kilowatt hour actually being received by the Company under legally established rates, namely, 2.383 cents. The Company was permitted to retain 73.065 per cent of these proceeds as its compensation for services rendered and the

City was to receive the rest (R. 294, 83). The rates to be charged consumers were required by the contract to be the rates legally established for the sale of electric energy (i. e., by the State Railroad Commission) (R. 81). In the event that any change in the then established rates for the sale of electric energy should take place by order of the State Railroad Commission; the amount to be retained by the Company and the amount to be paid by the City was to be proportionately increased or decreased. Several decreases in rates took place during the twelve-year period that the contract had been in operation before the present suit was brought, but due to the fluctuation in quantities of energy delivered under various rate schedules the actual difference between the total amount collected by the Company under the rates actually charged and the total amount which would have been collected under the rates in force at the time the contract was made only amounted to $25,000 for the twelve years of operation, as compared with over $26,000,000 paid to the City. At the time of commencement of the action no adjustment had been made between the parties for this decrease (R. 288). The contract by its terms was terminable on one day's notice, from either party to the other.

The City therefore had two means of controlling the situation with respect to the rates to be charged its inhabitants. First, under the contract it prescribed that the rates should not exceed those fixed by lawful authority, to-wit, the State Railroad Commission; and, second, it reserved the right to terminate the agreement on one day's notice at any time. The Company, on the other hand, was never in a position where it could either fix the

rates to the consumers or retain a monopolistic control over the supply of their energy because the City at any time on one day's notice could step in and take over the contract whenever it should acquire the physical means to effect distribution of the energy. The rate of generation is not controlled by the Pacific Gas and Electric Company's load dispatcher except that he, under the provisions of the contract, transmits to the power house at Moccasin Creek the daily fluctuations in the consumers' demands (R. 670, 291). The consumers themselves control the amount of energy to be taken, and the provisions of the contract require the Company and its load dispatcher to call upon the Moccasin plant up to 75 per cent of its maximum load capacity for the energy thus demanded by the consumers (R. 81, 82). It is true that the Company does not and cannot segregate on the bills to each consumer the number of kilowatts which come from the City's plant and the number of kilowatts which come by way of supplement from the Company's system. It is also true that the City, as a consumer of energy in its municipal railways, street and public building lighting, is charged by the Company at regular contract rates for energy having the characteristics required for these several businesses (R. 286, 292-293). The energy delivered and consumed by the City has been transmitted 35 miles and is delivered at a voltage and frequency radically different from that of the energy which it delivers to the Company at Newark. It of course is properly billed to the City at rates which include the value of services which the Company has performed upon it in transmitting it

from Newark to San Francisco, stepping down the voltage, and, in some instances, converting the frequency.[5]

THE POSITION OF THE SECRETARY OF THE INTERIOR.

The Government's statement of this position is incomplete. It is true that as soon as the contract was executed, the City submitted it to Secretary Work in 1925, who saw no reason or authority under the provisions of the Raker Act to formally approve it (R. 356). However, his Solicitor (Mr. Wright) in a letter to him approved its legality (R. 359-366) saying: "* * * This is not a contract of sale or lease, but rather one of agency, and that no evidence of a violation of the inhibitions of Section 6 of the Raker Act is presented by this contract;" (R. 234-235). Secretary Work also referred it to Attorney General Sargent, who took the same

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[5]A contract very similar to this one was upheld by the Supreme Court of California as a contract of agency and not of sale, and not violative of provisions of the Los Angeles Charter, which, even more stringently than Section 6 of the Raker Act, prohibited that city from selling to private corporations for resale purposes electric energy generated by the city on its Owens River project. See *Los Angeles Gas & Electric Corporation v. City of Los Angeles*, 188 Cal. 307, 312, 205 Pacific 125.

Fungible property has repeatedly held to be subject to agency contracts, as, for example, in grain elevators.

Mechem on Sales, Vol. 1, Sec. 25, p. 27;
Dryden v. Michigan State Industries, 66 Fed. (2d) 950 (C.C.A. 8, 1933);
In re Klein, 3 Fed. (2d) 375 (C.C.A. 2, 1924);
Colorado-New Mexico Wool Marketing Assn. v. Manning, 96 Colo. 86, 40 Pac. (2d) 972 (1935);
Lambeth Rope Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022 (1898);
First National Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681 (1889).

position as Secretary Work (R. 235). Three years later the Secretary called the City's attention to the fact that it was deriving revenues from power development under this contract, and that a portion of those revenues should be used to complete certain Yosemite Park road construction required under the Raker Act (R. 333). Secretary Wilbur's letter to the Mayor of San Francisco, referred to in the Government's statement (p. 7), did not state that continuance of the contract would be disapproved. The memorandum referred to in the opinion of Secretary Ickes (R. 238-239) was not approved by Secretary Wilbur, but was merely transmitted as being some unnamed person's views in his department. Secretary West, who preceded Secretary Wilbur, never questioned the City's action at all. It thus appears that neither Secretaries Work, West nor Wilbur ever took any adverse action with respect to the agreement in question, and it was not until Secretary Ickes took the matter up in August, 1935, after the contract had been in effect ten years, that the question was ever raised seriously by any Secretary of the Interior. His Solicitor (Mr. Margold), had advised him in 1933, that Section 6 prohibited a sale for resale, but did not interpret the section as prohibiting an agency contract (54 Land Decisions 316).

There is no evidence of any kind in the record to the effect that the Pacific Gas and Electric Company is making any inordinate profit out of the distribution of the energy, or that the rates charged to the consumers in San Francisco are any higher than they would be under direct municipal distribution, or that any benefit would result to any one through a termination of the contract. Such ter-

mination, on the other hand, would leave the City with no means of distributing the energy, the generation of which is made mandatory under Sections 9 (l), (m), and (n) of the Raker Act, and would cause its taxpayers a loss in revenue of $2,200,000 per year, and a possible shortage in power to meet consumers' demands (R. 416-418; offers of proof rejected).

SPECIFICATION OF ERROR.

The Government's petition states (Foot-note, p. 8) that the sole specification relied upon for granting a writ of certiorari is, the holding of the Circuit Court of Appeals for the Ninth Circuit that Section 6 of the Raker Act does not prohibit the grant to a private corporation of the right to sell electric energy originating at Hetch Hetchy, as agent for the City. We shall address ourselves to this specification, pausing only to quote the actual language of the opinion of the Circuit Court of Appeals (R. 674) as showing that the Government's use of the words "granting to private corporations" in its petition (p. 7) is inept and a misleading statement of the position of the Court of Appeals. The Court said, as we have pointed out:

> "The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal."

It is obvious therefore that the Circuit Court of Appeals did not hold that the City "granted" the Company any rights. It treated the relationship purely as one of contract employing an agent. The Government's specification should be given this construction in order to avoid misunderstanding.

REASONS FOR DENIAL OF WRIT.

The Government argues that the court below has passed upon an important question of Federal law which has not been settled but which should be settled by this court. We of course do not contend that the Raker Act is not a Federal grant or that this court has ever interpreted it. We reserve for the conclusion of this reply the point as to whether the question involved is an important one justifying review by the Supreme Court.

A. THE MEANING OF SECTION 6 OF THE RAKER ACT.

(1) Interpretation by Government Officials.

The Government correctly states that Section 6 prohibits the selling of the right to sell energy, and that the City construes that prohibition as forbidding the selling of the energy with the right of resale. This construction of the Act is in entire accord with every contention ever made by any representative of the Government prior to submission of its closing brief in the District Court, following trial of this case in October, 1937. The debates in Congress, the opinions of three Solicitors of the Interior Department, Edwards, Wright and Margold, hereinbefore

referred to, the Bill of Complaint herein (R. 6), the opening statement of counsel for the Government at the trial of this action (R. 190-192) and his position stated throughout the trial (R. 341, 427), the Government's opening brief in the District Court filed November 4, 1937, and curiously enough, in the Government's supplemental brief for appellee, United States, filed in the Circuit Court of Appeals herein (p. 8), where Government counsel say "The prohibition of the statute is against the granting to an individual or private corporation of the right to sell."—all the foregoing expressions of Government official opinion are to the effect that Section 6 prohibits a sale for resale—nothing else.

The language of Section 6 prohibiting sale for resale purposes or sale of energy with right of resale is not at all ambiguous. However, if the opposite were true and some ambiguity were found in the section, a construction of the Act which is in accord with the tenor of the debates in Congress, the opinions of the Solicitors of the Interior Department, and with the expressed views of the Secretaries of the Interior, should be followed by the courts in interpreting the section.

In *Brewster v. Gage*, 280 U.S. 327, 336, this Court held:

> "• • • It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."

Again, in *United States v. Minnesota*, 270 U.S. 181, 205, this Court said:

> "* * * So, even if there were some uncertainty in the act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction."

See also:

McLaren v. Fleischer, 256 U.S. 478, 481;
Wisconsin v. Illinois, 278 U.S. 367, 413.

(2) Analysis of Section 6 supports the "sale for resale" construction.

Analysis of the language of Section 6 supports this official interpretation by Congress, by Secretaries of the Interior and their Solicitors, and by counsel for the Government in this case. For convenience we quote it here again:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

Stripped of all unnecessary verbiage, Section 6 does only two things. It prohibits the grantee from "*selling*" the "*right to sell*" energy "*sold*" to any private person or corporation by the grantee. It prohibits the grantee from "*letting*" the "*right to sublet*" the electric energy "*given*" to any private person, firm or corporation by the grantee. The word "*given*" as used in the last line clearly refers to the energy delivered to a lessee or a vendee. It does not mean a gift. Congress cannot be presumed to have prohibited the City from making a

"gift" of public property, a thing which would be absolutely contrary to the laws of California, and an absolutely unnecessary provision. The word "sold" takes care of electric energy to which the title has been transferred through a sale, and the word "given" may be logically construed as taking care of the other prohibited transaction, namely, a letting or leasing of electric energy to be delivered—that is, given—under a sublease to some one else. The words "let to" and "sublet to" can only have the meaning of lease. Otherwise the preposition "to" would not have been included (R. 677).[6] As the Act reads, its prohibitions appear in pairs—"selling and letting", "sell and sublet", and "sold and given". We submit that our interpretation of this language coincides with the views of the legislators expressed in Congress, and is the correct view for the court to take. It follows therefore that if the contract under discussion does not sell the energy to the Company for resale or does not let it to the Company for subletting purposes, it does not violate Section 6.

The cases cited by the Government in support of its construction (so we submit) lend no aid to its contention.

Speigle v. Meredith, 22 Fed. Cas. No. 13,227, p. 911 (C. C. Ind. 1868), cited on page 9 of the Government's petition, holds that a conveyance of lands in consideration of personal property or choses in action (in that case, coupon bonds) is strictly and literally a "sale".

Borland v. Nevada Bank, 99 Cal. 89, 93, 33 Pac. 737, cited on page 9 of the petition, holds that a sale implies

[6]See Standard Dictionary definition of "let".

a reciprocal transfer of property for compensation, which compensation may be past, present, or future, whose value in money is agreed upon between the parties. The price must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. In addition to the necessity for a price there must be the assent of the parties that the transaction shall be a sale. The question in that case was whether securities deposited with the bank were sold or placed there as collateral.

In *Mansfield v. District etc. Assoc.*, 154 Cal. 145, 147, 97 Pac. 150, 151, cited at page 9 of petition, title to certain lots was transferred to defendant in trust, to be "sold or otherwise disposed of" for the purposes of meeting expenses of a Fair. Certain of these lots were conveyed in exchange for legal services. It was held that the power to sell "or otherwise dispose of" was broad enough to cover such an exchange.

In *Cole v. Laird*, 121 Iowa, 146, 149, 96 N.W. 744, cited on page 9 of petition, the plaintiff sued for the purchase price of two windmills which he alleged he had sold to the defendant. The latter denied the sale, claiming that he had received them as agent. A directed verdict for the plaintiff was reversed on appeal, the Supreme Court of Iowa holding:

> "A sale involves something more than the delivery of goods to another. It must appear also that a transmutation of property from one to another for an agreed price was *intended*."

Each of these four cases cited by the Government, it will be noted, involved a change of title and a definite ascer-

tainable value in terms of money rendered or to be rendered to the grantor. None of the cases involved, as here, the consignment to an agent upon terms prescribed by the principal, of fungible property to be sold for the principal's account. None of the Government's cases involved a prescription by the principal of the price to be charged, whereas the contract under review contains a requirement that rates be fixed by the public authority which is regularly vested by law with such functions.

Equally inappropriate are the citations by the Government on page 9 of its petition of cases defining the scope of the word "give". Each of these cases holds that the word "give" is often used with a meaning other than that of a gratuitous delivery and that, dependent on the context in some instances, it may be synonymous with delivery for a consideration or in exchange. No contention has been made in this case that the word "give" in Section 6 of the Raker Act refers to a gift by the City, or that either Congress or the City ever intended that the City should give away gratuitously its electric energy. Taking into consideration the context of Section 6, as we have hereinabove pointed out, the word "give" is correlated with the words "let" and "letting" and undoubtedly refers to delivery and disposal by lease as contrasted with delivery and disposal by sale. If the contract of agency involved here is not a delivery or disposal by either sale or lease, then it is clearly within neither of the two prohibitions in Section 6. The City has not "sold" to the Company the right to make sales any more than it has sold to its Mayor the right to govern the City or "sold" to the contractors who built the Hetch Hetchy project the right to build such

project, or "sold" to any of the hired agents through which a corporation alone can carry out its functions, the right, privilege, and duty to exercise the functions of their respective offices or employments. With this distinction in mind, the fallacy of the Government's reasoning in interpreting Section 6 is apparent.

B. LEGISLATIVE HISTORY OF THE STATUTE.

We are in accord with the principles of law upheld by the two authorities cited by the Government on page 11 of its petition to the effect that the legislative history of a statute may be examined for the purpose of determining its general purpose, although not for the purpose of construing particular language. We submit that an examination of the legislative history of the Raker Act, including the portions quoted by the Government in its petition, indicates that it was not the intent of Congress to prevent selling of electric energy for the City's account by an authorized agent so long as no title passed to the agent and the agent was not in a position to exercise monopolistic control or to make a profit out of the generation of the energy through utilization of the public lands granted under the Act. The reports of both the House and Senate Committees on Public Lands, as pointed out by the Government, state that the provision is designed to prevent any monopoly or private corporation from obtaining control of the water supply of San Francisco (H. Rept. 41, 63d Congress, 1913, p. 11. Analysis of Bill Presented to Senate by Senate Committee, October 4, 1913, Vol. 50, Cong. Rec, p. 5453).

The bill as originally drawn provided only a prohibition of selling or subletting the water sold. The introduction of the words "or electric energy" is explained in the statement of Representative Thompson of Illinois on August 30, 1913, Vol. 50, Cong. Rec., pp. 4096-4097. We quote from the record as follows:

> "Mr. Thompson of Illinois: Mr. Chairman, there seems to be some misgivings in the minds of some of the gentlemen here about the amount of compensation, and that seems to have arisen, in some measure, at least, because of doubt on the part of some as to the power possibilities in this bill. When this bill was being considered by the committee I offered an amendment to section 6, line 16, as it appears in the bill, by adding the words 'or electric energy'. With those words in that section, the bill amounts to this, that San Francisco can take this water, and San Francisco may develop such power as it may develop from the drop of that water from the Hetch Hetchy to the level of the city reservoirs and San Francisco may sell this water or electric energy—to whom? To any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption and only for consumption, and under this section it is absolutely impossible for San Francisco to *sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of re-selling it.*"

In other portions of the debates reported in Vol. 50 of the Congressional Record (pp. 462, c. 2; 3980 c. 1; 3996 c. 2; 4094 c. 2), it appears that members of the House and Senate were apprehensive that the City might sell the

electric energy to a private corporation, and that that corporation might resell it to its consumers at a substantial profit. Such experience on the part of the Government in granting storage rights to a power company in Arizona was reported by Representative Taylor in the hearings before the House Committee (Report on H.R. 6281, dated June 25, 1913, p. 123), and with respect to the Keokuk dam in the Mississippi River, by Senator Poindexter on the floor of the Senate, December 6, 1913 (Vol. 51 Cong. Rec. p. 301). Mr. Raker is quoted on page 12 of the Government's petition as saying that it was the purpose of the bill he had introduced to have San Francisco supply electric power and water to its own people.

What we do most earnestly contend is that there is nothing in the record in this case or in the Congressional Records at the time of the enactment of the Raker Act which indicates that the City of San Francisco represented to Congress, or that Congress intended that its distribution of its own energy to its own people would be accomplished solely through a municipally owned distribution system and without reference to the existing privately owned facilities. For example, the statements of the City Attorney at the hearings before the Committee on Public Lands clearly indicate that the problem being considered was one of water supply, and that the City intended to acquire and own its entire water system. There is not one word about the acquisition of a power distribution system. Congress was not concerned with the means used by the City to get the power to its people, so long as it did not part with title and control of its distribution.

While we think it unnecessary to go further than to point out that in the foregoing reports and debates Congress was concerned with the prohibition of sale for resale, and nothing further, if we were to assume with the Government that back of this prohibition was a Congressional policy of preventing private capital from making a profit out of the utilization of public resources, or obtaining a monopoly on the distribution of electric energy generated with water stored in part on public lands; still, one cannot read into Section 6 an intent that distribution through an agency contract should be prohibited.

If it had been the intention of Congress to provide that the City could distribute the electric energy generated on the Hetch Hetchy project to its people only through a municipally or publicly owned distribution system, as Secretary Ickes now contends, it certainly would have expressed that intention plainly and unequivocally in the Raker Act. The obligations placed upon the City therein are very specific under the language of Section 9 quoted, supra, page 3. It is made the duty of the City to first satisfy the needs of the land owners in irrigation districts for pumping sub-surface water for drainage or irrigation, and the needs of municipalities in those districts for actual public purposes, after which the City is expressly permitted to dispose of any surplus above these prior demands "for commercial purposes". Sections 9 (m) and 9 (n) make mandatory certain minimum power developments. As pointed out heretofore, at the time the Act was passed it was the intent of the City to utilize the greater part of the power in pumping its water supply over the Coast Range. If it had done that,

it is not conceivable and was not conceivable at the time the Act was enacted, that the development of electric energy prescribed by Congress in Sections 9 (m) and 9 (n) of the Act, would be anywhere nearly adequate to meet the then existing demand for electric energy in San Francisco. Under those sections the City was obliged to develop 10,000 horsepower within three years after completion of its works, 20,000 horsepower in ten years, and 30,000 horsepower in fifteen years. The total inadequacy of these developments to meet the power demands of a large city, particularly after satisfying the mandatory priorities in favor of irrigation districts bordering on the Tuolumne River and the then assumed physical necessity of pumping the water supply over the Coast Range is apparent upon even casual reflection. Certainly if Congress had intended that the City must acquire by purchase or construction, and periodically enlarge a municipally owned distribution system so as to keep this power developed on the Hetch Hetchy project entirely separate from the supplemental energy necessary to meet the demands of its people, Congress would have said so. As stated, no such provision appears in the Raker Act.

We submit that the contract in this case violates none of the policies stated by the Government in its petition (pp. 10-13) to be embodied in Section 6. The Pacific Gas and Electric Company has no monopoly on the Hetch Hetchy energy. As an agent for the City it does take delivery of this energy at the threshhold of the Bay region for the infinitesimal period of time necessary to transmit it 35 miles to San Francisco, performs upon it the services necessary to render it available to con-

sumers, and collects a price therefor prescribed by the City in the contract, to-wit, the lawful rates established by public authority in California. The Company retains out of these collections an amount which pays it, in addition to its operating expenses, a reasonable charge—not for utilization of the public lands granted to the City, but for its utilization of its own distribution system in San Francisco—and turns the rest of the money collected at the prescribed rates over to the City. This is no more a profit prohibited by the Raker Act than would be the case with a contractor's profit paid for his services and use of his equipment in building any unit of the project.

The City can terminate this relationship on one day's notice. It has the power of eminent domain. It can acquire the Company's plant by purchase or condemnation whenever its electors authorize such acquisition. It can duplicate the Company's plant with a competing system if it desires. The Government has failed to introduce or point out in the record one iota of evidence showing that the Company either has a monopoly or is making a profit out of the utilization of the public lands granted to the City. Such being the case, we say that there is no evidence that the alleged intent of Congress is being violated by the City through any hypertechnical construction of Section 6. The City is receiving a revenue from its present power development of approximately $2,200,000 per year (R. 416-418) through operation of this agreement. In the absence of proof to the contrary by the Government as plaintiff in this case, it is fair to assume that the profit, if any, from utilization of public lands to store and conduct water to the power house is all contained in this figure, and that it

goes to the City which built and operates this part of the project. The City competes with the Company in the generation of power as distinguished from its distribution.

There is neither allegation nor proof by the Government that the rates charged consumers in San Francisco for electricity are any higher under operation of the contract in question, and the regulation of the State Railroad Commission prescribed thereby, than would be the case if the City were to acquire the distribution system and operate it itself with municipal employees. There is not even a suggestion in the record that the rates charged for electric energy in San Francisco are inordinately high, and there is uncontradicted evidence (R. 287) that they have been repeatedly reduced during the life of this contract by the Railroad Commission which the City selects as its regulatory authority in the contract.

Finally, we ask the court to take judicial notice of the policy of the Government itself in recent years in construction of all the great Government storage projects in the western states under which it markets the electric energy derived from those projects, either to or through private corporations wherever the latter are established as the agencies by which the energy is distributed to the public. This practice is followed with respect to surplus power from the Government plant in Yosemite Valley, in the very Park involved here. It follows of necessity that the mere transmission and distribution of energy to consumers through privately owned systems is *not* a violation of any assumed general congressional policy that public resources shall not be developed by public agencies for private profit.

C. NO QUESTION OF IMPORTANCE IN THIS CASE JUSTIFIES REVIEW BY THE SUPREME COURT.

While the Raker Act is a Federal law and has not heretofore been interpreted by the court, it is a special statute dealing only with the rights of the City and County of San Francisco in a small area of the Yosemite National Park and Stanislaus National Forest. A judicial interpretation of this statute can scarcely furnish a precedent for the interpretation of any other statute. The questions involved are purely of local importance in San Francisco. The opinion of the Circuit Court of Appeals furnishes a careful and well written analysis of the facts and the law which should not be disturbed. The Government not only has suffered no damage or detriment of any kind but on the other hand has received a handsome income and profit under the operations of the City's project far exceeding in value that which it gave by its grant. It cannot possibly suffer any damage or detriment if the City is permitted to carry on under this agency agreement until such time as its voters may authorize it to carry out its charter declaration for public ownership of all utilities. On the other hand, a reversal of the views of the Circuit Court of Appeals would cause incalculable detriment to the City, to its taxpayers, and to its power consumers, and be of no benefit whatever to the Government.

There is no frustration of the powers of Congress. At the most there is merely a disagreement between the officials of San Francisco and the present Secretary of the Interior in the interpretation of a special Congressional grant. This situation, we submit, has been adequately resolved by the decision of the Circuit Court of Appeals for

the Ninth Circuit, and does not justify the issuance of a writ of certiorari.

Dated, San Francisco, California,
January 5, 1940.

Respectfully submitted,

JOHN J. O'TOOLE,
City Attorney
of the City and County of San Francisco,

DION R. HOLM,
Assistant City Attorney
of the City and County of San Francisco,

Attorneys for Respondent.

ROBERT M. SEARLS,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

ADDITIONAL BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

GARRET W. MCENERNEY,
Counsel for Respondent.

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(1) There are four questions involved in the Government's application for certiorari. Three of them deal with the construction of the forty-nine words which constitute the prohibition contained in Section 6 of the Raker Act approved December 19, 1913 (38 Stat. 242), the text whereof appears in the frontispiece to this brief. The remaining question is whether or not, in any event, the case is an appropriate one for certiorari.... 1

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(2) The decision of the Circuit Court of Appeals rests upon three propositions, two of which relate to the construction of Section 6, and the third to the interpretation of the agreement of July 1, 1925 between the Municipality and the Company. The Court held that the agreement was one of agency and not one of sale for resale and the Government does not ask certiorari to review this ruling. Hence its application is based wholly upon statutory construction, i. e., the construction of Section 6; and is met at the threshhold by the two propositions of statutory construction upon which rests the decision of the Circuit Court of Appeals, i. e., that Section 6(a) prohibits sale for resale, without more; and (b) does not prohibit a contract of agency..... 14

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(3) Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice; nevertheless, we here bring these to the attention of the court to make known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that we may show how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof; and also as a basis for invoking the rule that the petitioner should not here be heard upon a proposition never before advanced in the case (Helvering v. Minnesota Tea Co., 296 U. S. 378, 380; Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498) and contrary to that urged by it with directness and reiteration below (see supra, pp. 4-5). We reserve until later, consideration of the section textually 16

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(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was in the House. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a prohibition of sale for resale (and nothing more) 18

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(b) Whenever it had occasion to consider Section 6 in the period 1913-1937 the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale (and nothing more) 21

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(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type 31

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(d) In its opinion, the District Court followed the argument of the Department of Justice that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that Act because it was a contract of sale for resale and not a contract of agency. The Government's argument that agency is prohibited was noted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9), but was given no other consideration... 37

(e) The two briefs filed by the Department of Justice in the Circuit Court of Appeals on March 14, 1939

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and July 10, 1939, maintained its position unbrokenly that Section 6 forbids sale for resale.... 39

(4) The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale. In the discussion of this point we lay on one side Congressional debates and the interpretation put upon Section 6 in the Department of the Interior and by the Department of Justice in this action..... 40

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(5) It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency nor to forbid the same (see Opinion of Circuit Court of Appeals, supra pp. 11 ft., 12 ft.). The argument for a latitudinarian construction of Section 6 contended for in the petition for certiorari is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that the Government has never contended to the contrary of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C.C.A. p. 8, quoted supra p. 7); concessions seemingly renewed by implication in petition for certiorari, p. 7, footnote 5, last line.... 45

(6) In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which

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"transcends the judicial function" (298 U. S. 237). The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition 56

(7) The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are some provisions of the statute to support them.... 60

(8) There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, nor that the congressional policy which underlies Section 6 is any broader than that expressed therein 61

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(9) There is no sound argument in the petition for certiorari to overthrow the proposition (a) that it is the purpose of Section 6 to and it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency. With this being shown, nothing remains for us to do except to answer question third, supra, page 2, by showing that there is no remaining argument in the petition respecting the interpretation of Section 6 which, if sound, would call for a reversal of the decree of the Circuit Court of Appeals. Indeed, we expect to show there is no remaining argument at all 65

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THE GENESIS OF SECTION 6 OF THE RAKER ACT.*

June 25, 1906: President Theodore Roosevelt's Dictation for Inclusion in The Owens River Grant to Los Angeles (R. 657, 659-660).

". . . that . . . the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the City for irrigation purposes."

June 30, 1906: The Owens River Grant to Los Angeles (34 Stat. 801, 803).

"Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

April 7, 1913: Earliest Form of Section 6 of the Raker Act, H. R. 112, 63rd Congress, 1st Session.

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county."

December 19, 1913: The Raker Act (38 Stat. 242).

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

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*We refer throughout to the first clause of Section 6. As the Government noted in one of its briefs below: "The second clause of Section 6, stated in the form of a proviso, plainly **does not relate to the same subject matter as**, or restrain, modify, or otherwise affect, **the first clause**. The word 'Provided' has no significance here, simply serving to separate or distinguish the two clauses" (Govt. Supp. Br. CCA, p. 18, line 30 to p. 19, line 3).

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

ADDITIONAL BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

(1) There are four questions involved in the Government's application for certiorari. Three of them deal with the construction of the forty-nine words which constitute the prohibition contained in Section 6 of the Raker Act approved December 19, 1913 (38 Stat. 242), the text whereof appears in the frontispiece to this brief. The remaining question is whether or not, in any event, the case is an appropriate one for certiorari.

The following four questions are the only ones (so we submit) involved in the disposition of the Government's Petition for Certiorari.

First: Is it the purpose of Section 6 to, and does it prohibit sale for resale?

Second: Does Section 6 prohibit a contract of agency?

Third: If (a) Section 6 does prohibit sale for resale and (b) does not prohibit agency, is there any remaining argument of the Government respecting the interpretation of Section 6 which if sound calls for a reversal of the decree of the Circuit Court of Appeals?

Fourth: Is the present action one of a type wherein this Court grants certiorari (Rule 38) considering that we are here dealing with what might be called a private bill involving matters of local concern and not of national moment, i. e., a statutory grant by a proprietor, as contradistinguished from a sovereign, made upon adequate and more than adequate consideration paid by the Municipality to the Government in money and money's worth including the annual statutory payment to the Government, which within the period December 19, 1913-December 19, 1938, totalled $350,000., and since the latter date is $30,000. annually in perpetuity (Raker Act, Sec. 7, R. 21:17-27), all for land and easements, etc. in lands,[1] as

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[1] At the final hearing in the District Court, Joseph James Phillips, Director of Property for the Municipality (R. 311) and R. P. Hansen, one of its civil engineers (R. 305) gave testimony (R. 558-564) that the value of the lands obtained by the Municipality from the Government was $244,139.75 (R. 559) and that the moneys paid to the Government and for work performed by the Municipality by the requirement of the Government, including $350,000. for annual rental, totalled $2,702,607. (R. 564). This testimony was later stricken out (R. 557-564). We submit it should be taken into account in determining whether it is appropriate in any event to grant certiorari in the case.

The Government may have proceeded upon the idea that it should be paid for the benefits which would accrue to the Municipality rather than compensation for the lands granted. This is contrary to the universal rule in kindred situations. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195 (1910): "It [the Constitution] merely requires that an owner of property

Congress did not grant any water or water rights and as the Municipality acquired the waters and water rights involved through appropriations under the laws of California and not from the United States? (Raker Act s. 11, R. 36); and considering in addition that recovery by the Government herein would confer no benefit whatever upon it but inflict great damage and injury upon the Municipality?

The First Question.

Is it the purpose of Section 6 to and does it prohibit sale for resale?

The proposition stated in the Petition, page 8 foot, that **"the 'selling' prohibited is not the selling of energy for resale" was never before advanced in this case;** and is contrary (a) to the plain language of section 6, (b) to the views expressed with unanimity in Congress during the passage of the act; (c) to the unbroken interpretation of the section by the Department of the Interior within the period 1913-1937; (d) to the position taken by the Department of Justice in the District Court (1) in the

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taken should be paid for what is taken from him. . . . And the question is what has the owner lost, not what has the taker gained"; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 76 (1913); "The value should be fixed . . . with reference to the loss the owner sustains . . . and not as enhanced by the purpose for which it was taken"; 20 *Corpus Juris* 776, "Eminent Domain", § 232: "Compensation must be reckoned from the standpoint of what the landowner loses by having his property taken, not by the benefit which the property may be to the other party to the proceedings."

Grants by the United States to a political subdivision of one of the states of the Union are to be dealt with on the basis that they are such, and it would have to be assumed, even if the case were one of a gratuitous grant, that the general government acted as *parens patriae*.

complaint filed therein; (2) in the opening statement at the final hearing: (3) in its position stated anew by counsel through the final hearing (October 19, 20, 21, 1937) in arguments respecting the admission and rejection of proposed evidence; and (4) in its two printed briefs there submitted November 1, 1937 and February 26, 1938; and (c) to the position taken by the Department of Justice in its two briefs filed in the Circuit Court of Appeals, March 14 and July 10, 1939, notably the later i. e. "Supplemental Brief for Appellee United States" (referred to herein as "Govt. Supp. Br. C.C.A.")[2] where speaking to the point here under consideration, it said:

Govt. Supp. Br. C.C.A., July 10, 1939.

"The right to sell, granting of which is prohibited by section 6, is . . . the right to sell the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 3-7).

"Congress was restricting the City in dealing in a proprietary capacity with water and energy obtained by the use of the property of the United States" (p. 4, lines 8-11).

"Sale for resale is prohibited" (p. 6, line 5).

"[Any suggestion which] implies that sale for r under certain circumstances is not prohibited, is [untenable]" (p. 6, lines 6-8).

"Congress sought out the strongest terms it could find to prohibit a transfer by the City grantee to any

[2]Certified copies of the four Briefs filed by the Government as above mentioned, two in the District Court and two in the Circuit Court of Appeals are filed with this brief. Nine additional copies of each of them are also filed except of the first brief, that submitted in the District Court November 1, 1937, of which no additional copies are filed because they are not available.

private corporation or individual of an unrestricted ownership of the energy or water" (p. 6, line 27 to p. 7, line 2).

"Any sale or transfer by the City to such a corporation or individual must be of such nature that it does not carry with it the right to sell" (p. 7, lines 2 to 4).

"The statute clearly prohibits a sale which permits a resale, in other words, a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed" (p. 7, lines 10-15).

"The prohibition of the statute is against the granting to an individual or private corporation of the right to sell" (p. 8, lines 19 to 21) "the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 6 and 7).

"Section 6 of the Raker Act prohibits sale for resale" (p. 9, lines 4-5).

"**The breach occurs not in the sale, but in transferring with it the right to sell**" (p. 9, lines 11-13).

The Second Question.

The second question is whether Section 6 prohibits a contract of agency. The Government so contends.

This contention is contrary to (a) the plain language of section 6; (b) the views expressed with unanimity in Congress during the passage of the act; (c) the unbroken interpretation of the section by the Department of the Interior within the period 1913-1937; and (d) the position taken by the Department of Justice in the District Court (1) in the complaint filed therein; (2) in the opening statement at the final hearing; (3) in its position stated

anew by counsel through the final hearing (October 19, 20, 21, 1937) in arguments respecting the admission and rejection of proposed evidence and (4) in the opening "Brief for Plaintiff" United States filed in the District Court November 1, 1937.

The brief of the Government lastly mentioned was followed by Brief for Defendant submitted December 20, 1937, wherein it was said (p. 22, lines 12-15):

> "The Government concedes (so we understand) that an agency contract does not violate the Raker Act but contends that the contract under review is not an agency contract."

Then followed the Reply Brief for Plaintiff submitted to the District Court, February 26, 1938, wherein, for the first time the Government made the contention that Section 6 forbade a contract of agency, and wherein as will be noted, the Government explicitly stated that this was a new contention. (Indeed it was one never before put forward.)

Reply Brief for Plaintiff United States in District Court.

The brief said (pp. 17-18):

> "Section 6 of the Raker Act is violated by the selling or letting to the company of the right to sell power generated at Hetch Hetchy, whether or not accompanied by transfer to the company of title to the power itself. This argument may be regarded as a new contention on the part of the United States, par-

ticularly in view of the statement of the issue in the opening statement for the plaintiff. (Tr., p. 12.)[3] It is, therefore, recognized and conceded that the defendant may file reply thereto as it may be advised."

In order that we may have before us the limitations which the Government in a later brief put upon its argument that Section 6 forbids a contract of agency, we quote from the above mentioned "Supplemental Brief for Appellee, United States", filed in the Circuit Court of Appeals (p. 8), as follows:

Govt. Supp. Br. C.C.A., July 10, 1939.

"Contrary to the statement in the [Municipality's] Outline of Oral Argument (p. 17), the Government has never argued 'that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent' and there is nothing in the decree which requires that the City make distribution without an agent.

The prohibition of the statute is against the granting to an individual or private corporation of the right to sell. Solicitor Edwards recognized that it did not prohibit employment of an agent for transmission purposes (R. 353-355) and the Government has never contended to the contrary.' The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City."

[3]The opening statement for the plaintiff, referred to above as appearing in Tr. p. 12, appears in the Record, pp. 189-192, particularly in R. 189:28-190:14, and R. 191:27-192:10. The pertinent quotations therefrom appear infra p. 32

The First and Second Questions Jointly.

As the first question is whether it is the purpose of Section 6 to, and whether it does prohibit sale for resale and the second question whether it prohibits a contract of agency, it is important in each instance that the text of Section 6 should be in mind.

Section 6 of the Raker Act reads as follows:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

If we strip the section of unnecessary words and omit the words "letting" and "sublet" as not presently germane we will find the meaning of the section standing out strikingly. Thus dealt with, it reads as follows:

> "Sec. 6. That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual . . . the right to sell . . . the water or the electric energy sold . . . to it or him by the said grantee [San Francisco]."

It is to be noted that Congress was here making provision in respect of a sale (of either water or electricity) by the grantee (here the City and County of San Francisco) to a corporation or an individual and prohibiting "a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed" (Govt. Supp. Br. C.C.A. p. 7, lines 10-15, quoted supra p. 5).

Section 6, as appears by the frontispiece, was copied from Section 6 of The Owens River Grant to Los Angeles, approved June 30, 1906 (34 Stat. 801) which had been incorporated in the Los Angeles grant at the request of President Theodore Roosevelt and in words dictated by him in a letter to the Secretary of the Interior dated June 25, 1906 (R. 657, 659-660), five days before the measure was passed and approved by him.

The prohibition in the Dictation of President Theodore Roosevelt for inclusion in The Owens River Grant, as well as that in Section 6 of that grant, and finally, as in Section 6 of the Raker Act, involves an ellipsis[4] (so we submit),

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[4]An ellipsis is defined as follows: "Omission of word or words, usually such as will be inevitably supplied by the mind, or understood, in the construction of a sentence" (Wyld's Universal English Dictionary, 1936); "Omission of word or words easily understood but necessary to the grammatical construction" (Macmillan's Modern Dictionary, 1938); "The omission of a word or words necessary to the complete construction of a sentence but not required for the understanding of it" (Standard Dictionary, 1908); "Omission from a construction of one or more words, which are obviously understood, but which must be supplied to make the expression grammatically complete, etc." (Webster's International Dictionary, 1919). "The omission of one or more words in a sentence, which would be needed to complete the grammatical construction or fully to express the sense" (The Oxford Dictionary (1897)).

In re Lippincott's Estate, 276 Pa. 283, 120 Atl. 136 (1923), says (p. 137, c. 2 foot):

> "An elliptical form of expression is quite common in writing and speaking alike, and perhaps in wills and contracts most of all. It is not necessary to repeat things that have just been expressed; they are understood to be in the mind of the speaker or writer, and the listener or reader likewise understands them, without repetition. In Goold Brown's Grammar of English Grammars it is said, at page 815:
>
> "'Ellipsis is the omission of some word or words, which are necessary to complete the construction, but not necessary to convey the meaning. Such words are said, in technical phrase, to be understood; because they are received as belonging to the sentence, though they are not

and as "there is no canon against making explicit what is implied" (*United States v. Sischo*, 262 U.S. 165, 169, opinion by Mr. Justice Holmes (1923)); we supply the omission in three different versions as follows:

The Ellipsis: Two Versions:

"Sec. 6. That [in selling or letting water or electric energy] [or] [in sales or leases of water or electric energy] the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The Ellipsis: Third Version.

"Sec. 6. That the grantee is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

(We submit that the words supplied by us as upon an ellipsis do no more than express the interpretation of Section 6 put upon it by the Government in the language above quoted from Govt. Supp. Br. C.C.A., supra pp. 4-5.)

In some instances, an ellipsis consists in the omission later of what had been expressed before; but the same rule is applicable of course where the omission of words

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uttered. Of compound sentences, a vast number are more or less elliptical; and sometimes, for brevity's sake, even the most essential parts of a simple sentence are suppressed. There may be an omission of * * * even a whole clause, when this respects what precedes.' "

is at the beginning but clearly indicated by what follows, as in this case.

(We submit that the language of Section 6, without addition, clearly manifests the purpose which we ascribe to the section, and with the supplied words that meaning is made doubly certain.)

In connection with the first and second questions jointly which we have here under consideration, it will be helpful if we quote how they were dealt with in the opinion of the Circuit Court of Appeals:

Opinion of Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals says (R. 674, 106 F.2d 575, c. 1, lines 12-32):

> "We conclude that there was no sale made by the City to the Company of the electric energy distributed to the customers in San Francisco and that the contract was one by which the City employed the Company to transmit the City's power to the consumers thereof in the City.
>
> The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal.
>
> We conclude that the City did not violate Section 6 of the Raker Act by making a sale of electric energy to the Company."

Opinion of Circuit Court of Appeals (Continued).

Again (R. 676-677; 106 F.2d 575, c. 2, line 26 to p. 576, c. 1, line 10):

"The City, in its brief submitted after the argument, contends that Section 6 of the Raker Act prohibits a sale of electric energy for resale.[5] It states: 'The government and the municipality are agreed that Section 6 prohibits sale for resale.'

The United States, in its brief submitted after argument, states: 'The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City.'

It concedes, however, that the Act 'did not prohibit employment of an agent for transmission purposes.'

In view of the position of the City that the Act prohibits a sale for resale, we base our decision upon the sole ground that the contract between the City and the Company was an agency agreement and not a contract of sale.

As to the contention of the United States, reasserted and amplified in its brief after argument, that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City for disposition of the energy on its behalf, it is sufficient to point out that what we have already said disposes of this question. We point out further, however, **that there are no words contained in Section 6, supra, that are appropriate to prohibit such**

[5]This statement should not be read as saying that the City had so contended for the first time. In fact, from the very beginning the position of the Government that Section 6 forbids sale for resale was concurred in by the City.

an arrangement. The United States relies much on the fact that Section 6 prohibits not only 'selling' the 'right to sell' but also prohibits 'letting' that right. But the term 'letting' in Section 6 obviously means leasing. This is clear by the use of the word 'to' between the word 'letting' and the words 'any corporation' in the section."

The Third and Fourth Questions.

It is impossible profitably here to do more than mention the third and fourth questions until it is made clear beyond peradventure how the first and second questions should be answered, namely, that Section 6 forbids sale for resale and does not forbid agency. Accordingly, we shall consider these latter propositions after a short summary of the propositions involved in the decision of the Circuit Court of Appeals with a reference to those of them sought to be reviewed here and later give consideration to the third and fourth questions.

(Note in the preceding paragraph that the argument that Section 6 prohibits sale for resale in the Government's last brief below (supra pp. 4, 5) merely "reasserted and amplified" what had been contended for by it before. Note, also, that the Government claimed below that the prohibition of sale for resale and a prohibition of agency co-existed and arose out of the same language.)

(2) The decision of the Circuit Court of Appeals rests upon three propositions, two of which relate to the construction of Section 6, and the third to the interpretation of the agreement of July 1, 1925 between the Municipality and the Company. The Court held that the agreement was one of agency and not one of sale for resale and the Government does not ask certiorari to review this ruling. Hence its application is based wholly upon statutory construction, i. e., the construction of Section 6; and is met at the threshhold by the two propositions of statutory construction upon which rests the decision of the Circuit Court of Appeals, i.e., that Section 6 (a) prohibits sale for resale, without more; and (b) does not prohibit a contract of agency.

The decision of the Circuit Court of Appeals (R. 661-677, 106 F.2d 569) as we have seen by its Opinion supra pp. 11-13, rests upon three propositions. (The parties were in agreement below as to the first but not as to the second or third.) The three propositions are (1) that Section 6 of the Raker Act forbids the Municipality to sell electric energy to a corporation (excepting certain public corporations) or individual for resale; (2) that the prohibition does not extend to a contract of agency; and (3) that the agreement of July 1, 1925 between the Municipality and the Company is one of agency and not one of sale for resale.

The Government does not seek certiorari to review its specification of error that the Circuit Court of Appeals erred "in failing to hold that the contract of July 1, 1925 between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act" (Petition, p. 8, lines 3-6). This specification "is not urged as a reason for granting the writ of cer-

tiorari, but is reserved for argument on the merits" (Petition, p. 8, footnote 6); and it is said that "if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City" (Petition, p. 2, footnote 1).

In these circumstances, we feel that we are neither called upon nor entitled to enter upon a discussion to show that the contract is one of agency and not one of sale for resale; but in that connection, we wish to note that the Government, with seeming studied purpose, has set forth in its Petition statements in respect of the contract which constituted the grounds upon which it asked the courts below to hold that the contract was one of sale and not one of agency. In our opinion, these statements are not pertinent to the questions sought to be presented in the Petition, but if they should be thought to be so, we wish to draw the attention of the Court to the fact that they are not pertinent to the question whether the contract is one of agency or one of sale for resale because that question is not here for consideration and to suggest that the Petition should be treated as though it contained an explicit acceptance by the Government of the decision of the Circuit Court of Appeals upon the interpretation of the contract.

Leaving on one side the interpretation of the contract as not presently pertinent and treating the agreement for present purposes as one of agency and not one of sale for

resale, we are concerned only with the propositions involving the construction of the pertinent part of Section 6 of the Raker Act approved December 19, 1913 (herein spoken of as Section 6, without more), 38 Stat. 242 (R. 12-36, 192-216).

We propose now to consider the interpretation of Section 6, treating it, first, historically, and next, textually.

(3) Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice; nevertheless, we here bring these to the attention of the court to make known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that we may show how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof; and also as a basis for invoking the rule that the petitioner should not here be heard upon a proposition never before advanced in the case (Helvering v. Minnesota Tea Co., 296 U. S. 378, 380; Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498) and contrary to that urged by it with directness and reiteration below (see supra, pp. 4-5). We reserve until later consideration of the section textually.

From the beginning the Government has steadfastly argued that Section 6 was a clear and unequivocal prohibition against sale for resale.

In its first brief filed in the District Court November 1, 1937, it is said (p. 58):

> **Brief for Plaintiff (U. S.) November 1, 1937 (D. C.)**
>
> "It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale

of such energy to a private party for the purpose of resale. **In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified.**"

We agree with the position of the Government thus stated in the first brief it filed in the District Court; and we quote, infra, pp. 56-59, from decisions of this and other courts to the effect that "as this court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive" (*Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937)).

The same is true of the interpretation put upon Section 6 in the Department of the Interior. There is nothing ambiguous in the prohibitions but if there were, the interpretation of the Department through the years would be followed. *United States v. Minnesota*, 270 U.S. 181, 205 foot (1926): "Even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction"; *Wisconsin v. Illinois*, 278 U.S. 367, 413 foot (1929): "Nothing is more convincing in interpretation of a doubtful or ambiguous statute"; *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921): "If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except

for cogent reasons"; *Brewster v. Gage*, 280 U.S. 327, 336 foot (1930): "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons"; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 foot (1931): "They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons."

With these views in mind, we proceed to consider the interpretation which has consistently been put upon Section 6 by the different departments of the Government and to show that for twenty-four years (1913-1937) including the period during which the Raker Act was in course of enactment in Congress, there was unanimity in the interpretation of Section 6 as forbidding, in cases presenting the contentions here present, sale for resale and nothing more.

(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was in the House. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a prohibition of sale for resale (and nothing more).

Discussion of Section 6 in the House.

The purpose of Section 6 was dealt with in the House on August 29, 30 and September 2, 1913, by Representative Towner of Iowa, Representative Thomson of

Illinois, a member, and Representative Ferris of Oklahoma, Chairman of the House Committee on the Public Lands. They said:

"It is proposed in this bill that the city can not sell water or power to any corporation or individual to sell or sublet. But it is not provided that the city may not sell to any corporation it chooses all the water or electric energy it desires for its own use." (Representative Towner, August 29, 1913, 50 Cong. Rec. Appendix, p. 462, c. 2.)

"Under the provisions of section 6 the grantee . . . can not sell water or electric energy to any private corporation or individual for the purpose of resale." (Representative Thomson, August 30, 1913, 50 Cong. Rec. 3980, c. 1, top.)

"Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individual or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? . . . If this language is read carefully I think it will be seen that . . . these municipalities are prohibited from ever selling or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it." (Representative Thomson, August 30, 1913, 50 Cong. Rec. 3996, c. 2, top.)

"It says that the city can sell their water power to private individuals or corporations for consumption, but not for the purpose of resale." (Representative Thomson, September 2, 1913, 50 Cong. Rec. p. 4094, c. 2, middle.)

"When this bill was being considered by the committee I offered an amendment to Section 6, . . . by

adding the words 'or electric energy'. With those words in that section . . . San Francisco may sell this water or electric energy . . . to any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2, ft.–4097, c. 1, top.)

"San Francisco could not sell to any soap manufacturer or ice manufacturer anything that they could resell, but they could sell it to them for their own use." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 1, foot.)

"There is an express provision to the effect that they can not resell the power in any way. They can sell for use only with a positive restriction against sale for any resale purposes of any sort." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 2, middle.)

It is manifest that these members of the House who spoke respecting the meaning of Section 6 read the section as it is written and had no difficulty in understanding that the provision was intended to prohibit sale for resale (and nothing more).

We now consider how the section was dealt with in the Department of the Interior.

(b) Whenever it had occasion to consider Section 6 in the period 1913-1937 the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale (and nothing more).

The record shows that Section 6 came under review or was mentioned or referred to in the Department of the Interior on five different occasions and that there were three formal opinions by Solicitors of the Department and one by the Secretary dealing with the subject.

The first was by Solicitor Edwards, June 8, 1923 (R. 342-354); the second by Acting Solicitor Wright, July 20, 1925 (R. 234, last line; 359-366); the third by Solicitor Margold October 27, 1933 (54 I. D. 316; R. 243, line 14); and the fourth by Secretary Ickes August 24, 1935 (R. 232-269).

In each of these, the opinion was expressed in one form or another that Section 6 forbids sale for resale, without more.

Solicitor Edwards' opinion did not deal with the contract of July 1, 1925 for it was rendered in 1923 two years before the contract was made.

Acting Solicitor Wright, whose opinion was written nineteen days after the execution of the contract of July 1, 1925, held "that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute" (R. 234:31-235:8).

Solicitor Margold dealt with the meaning of Section 6 abstractly, and not specifically in reference to the contract. He held (in 1933) that "San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the mu-

nicipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed" (54 I. D. 316, 317).

Secretary Ickes held that Section 6 forbids a contract of sale for resale and that the contract of July 1, 1925 was such a contract of sale for resale and not one of agency and therefore was in violation of the Raker Act.

Considering that the Government is **not** asking certiorari to review the ruling of the Circuit Court of Appeals that the contract is one of agency and not one of sale for resale, it would seem to be at least a trifle unfair when it says, Petition, page 7, "Secretary Ickes concluded that the contract was in violation of the Raker Act", without more, whereas it should have said "Secretary Ickes concluded that the contract was [one of sale for resale and] in violation of the Raker Act [because Section 6 of that act forbids a contract of sale for resale]".

There is nothing to show when Acting Solicitor Wright's opinion was made public or came to the knowledge of the Municipality. So far as the Record shows it first became publicly known through reference thereto in Secretary Ickes' opinion of August 24, 1935 (U. S. Ex. 11, R. 230-269), where it is said (R. 234:31-235:8):

> "On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute."

Secretary Ickes' opinion was introduced in evidence by the Government. The Municipality offered the opinion of Acting Solicitor Wright. The Government objected. The

opinion (for text thereof, see R. 359-366) was received in evidence subject to a motion to strike it out, and later, on motion of the Government, was stricken out. This was Assignment of Error No. 11 by the Municipality (R. 535).

Opinion of Solicitor Edwards: Circumstances Giving Rise Thereto.

The work of construction of the Hetch Hetchy project covered the period 1913-1925, and in that period it became necessary for the Municipality to provide electric energy necessary in construction work. By 1918 the Municipality had constructed and was operating in the High Sierras the Early Intake Power House, which is a relatively small one, presently furnishing only 3% of the entire electric energy generated by the Municipality.[6] The amount generated at Early Intake in 1918 exceeded construction requirements and there was a surplus either to waste or to be disposed of. This was during the World War. The Federal Power Administrator for California September 18, 1918 directed the Municipality to make arrangements to turn this power over to the Sierra and San Francisco Power Company so that it would be available for general use (R. 408-410), which was accordingly done. The Pacific Gas and Electric Company had no interest in the Sierra and San Francisco Company at that time, but later became lessee of its system, and later still, acquired its physical properties.

[6]The contract of July 1, 1925 deals only with energy generated at the Moccasin Power Plant, but the District Court finds that "since late in 1935, the electric energy . . . [generated] at the City's Early Intake plant . . . has been and is now being delivered to the Company under the terms of the contract" of July 1, 1925 (R. 161).

This disposition of the Early Intake surplus power continued to 1923 by which time the sale of energy through a period of five years had totalled $200,000 (R. 345 foot). In that year the National Park Service called the situation to the attention of the Secretary of the Interior and this fact gave rise to Solicitor Edwards' opinion, which is mentioned in the opinion of Secretary Ickes, from which we quote, infra, pages 26-27.

Opinion of Solicitor Wright: Circumstances Giving Rise Thereto.

The Ordinance of San Francisco authorizing the contract of July 1, 1925 was "passed for printing" (for that term, see R. 219) June 22, 1925, and was finally passed and approved by the Mayor June 29, 1925 (R. 90).

Section 2 of that Ordinance provided (R. 89): "As soon as said agreement is duly executed by the parties therein named, a duly executed copy or certified copy thereof shall forthwith be presented to the Secretary of the Interior of the United States at Washington, D. C.".

Within the week June 22-29, 1925, Assistant City Attorney Dailey and City Engineer Eckart of San Francisco were in Washington conferring with Mr. Edwards, Assistant Secretary of the Interior (in the absence of Secretary Work) about the contract, and Mr. Dailey remained on the same errand to July 4, 1925 (R. 335:4-337:3).

The District Court refused to receive the testimony of Mr. Dailey respecting the substance of his conversation with Mr. Edwards (R. 337:4; Ruling and Exception No. 9: R. 533; Assignment of Error No. 9), but it is clear that Mr. Edwards received from Mr. Dailey a copy of the contract because Mr. Dailey was pressing for an approval

of the contract by Secretary Work as one of agency and not one of sale for resale. A copy of the contract was delivered presumably by Acting Secretary Edwards to Acting Solicitor Wright for an opinion on its validity, and the latter rendered to the Secretary the above mentioned opinion of July 20, 1925, which, so far as the record shows, never became public nor known to the Municipality until 1935.

Secretary Work having returned to Washington in late July or early August, 1925, the Mayor and Chairman of the Finance Committee of the Board of Supervisors of the Municipality went to Washington to procure the approval of the contract by Secretary Work as one of agency and not one of sale for resale, with the result that on August 19, 1925, Secretary Work wrote the Mayor of San Francisco, then in Washington, telling him that the Act did not require his approval of the contract, and he would "await a reasonable time until performance shall have indicated whether or not the acts of the parties constitute such a violation of the law as will make action on his part proper" (R. 357).

No ruling upon the question, which after all was the question whether the contract was agency or sale, was ever made by Secretary Work.

In 1930 Secretary Wilbur had discussions with representatives of the Municipality, principally due to delinquency in performance of conditions required by the Raker Act in respect of the construction of roads, trails, etc. and the contract of July 1, 1925 was incidentally mentioned, but it was spoken of by the Secretary

on the theory that it was one of sale for resale and hence in violation of the Raker Act because, so it was assumed on all hands, the act forbade sale for resale.

Solicitor Margold's Opinion: Circumstances Giving Rise Thereto.

It is evident that an inquiry was addressed to the Secretary of the Interior in 1933 which called for an interpretation of the Raker Act and that Mr. Margold's Opinion of October 27, 1933 (54 I. D. 316) was given in consequence of the inquiry but without any direct reference to the contract of July 1, 1925. In Secretary Ickes' Opinion in 1935 (R. 243) reference is made thereto, but it is erroneously cited, without title, as appearing in 51 I. D. 316, whereas the citation should have been 54 I. D. 316.

Secretary Ickes' Opinion: Circumstances Giving Rise Thereto and Extracts Therefrom.

Secretary Ickes fixed a hearing respecting the validity of the contract of July 1, 1925 for May 6, 1935 (R. 227-229) and after that hearing rendered his opinion offered in evidence by the Government at the final hearing (R. 232).

This opinion of Secretary Ickes, August 24, 1935, brings out clearly his own ruling that Section 6 of the Raker Act prohibits sale for resale, and that he put the invalidity of the contract of July 1, 1925 on the ground that it involved sale for resale. In the course of his opinion, dealing with the interpretation of Section 6, he said:

Extracts from Secretary Ickes' Opinion.

"In an opinion dated June 8, 1923, the Solicitor [of the Department of the Interior, Mr. Edwards] determined that any sale of Hetch Hetchy power for the

purpose of resale was prohibited by the Raker Act. . . . He suggested that an arrangement be made 'by which the grantee [the City and County of San Francisco] would have its power transmitted over the lines of the concern [Pacific Gas and Electric Company] owning or controlling the existing distribution system'." (R. 234:11-23).

"Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. . . ." (R. 234:24-28).

"On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute." (R. 234:31-235:8).

"A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate.[7] In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Immediately after pointing out that the contract might be viewed (1) as Proper, (2) as improper, or (3) as

[7] Of course if the Attorney General felt that he would be called upon at that time to say that in his opinion the contract was one of agency and not one of sale, the opinion would be a source of embarrassment in the future. On the other hand, if he was of the opinion that the contract was one of sale and not one of agency, there would not be any embarrassment in the future because his position in the litigation would be in harmony with his opinion.

proper because temporary, he stated, 'In the exercise of your discretion you may come to the conclusion that this last is the correct view'.[8]

After receiving that advice, Secretary Work on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time." (R. 235-236).

"The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act." (R. 242:14-18)

". . . . San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers." (R. 243:9-13)

"An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated," etc. (R. 243:24-27)

"San Francisco was granted certain rights on federally owned lands, subject to various conditions, among them those contained in section 6, prohibiting sale for the purpose of resale of any electric power developed on the land." (R. 245:13-17)

"I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the

[8]We understand the meaning of this last sentence to be that the Secretary of the Interior could decide that the contract was proper because temporary, without holding any view as to whether it was proper (generally) or improper.

purpose of resale and that this prohibition is legally valid." (R. 247:1-4)

More Extracts from Secretary Ickes' Opinion.

Thereupon Secretary Ickes proceeded to deal with the contract, and we quote his language in respect thereto as re-assertions of his conviction that Section 6 forbids sale for resale (and nothing more). The Secretary said:

"In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute." (R. 248:20-22)

"It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers." (R. 256:9-11)

"It is my opinion that the provisions of section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale." (R. 267:31-268:4)

The foregoing extracts from Secretary Ickes' Opinion make it very clear that his position was (a) that Section 6 of the Raker Act is aimed at sales with the right of resale; and (b) that the contract of July 1, 1925 would have been valid had he found it to be a contract of agency, but inasmuch as he found it to be a contract of sale for purpose of resale, he held it to be in violation of the Raker Act.

Secretary Ickes' Correspondence With Board of Supervisors (S. F.) and the Attorney General 1937.

Later, Secretary Ickes had correspondence with the Board of Supervisors of San Francisco, followed by a

letter wherein the Secretary requested the Attorney General to bring this action, of which we quote only so much as bears upon the point which we now have in hand.

> Secretary to Board, March 11, 1937: ". . . I have already advised you of my determination that San Francisco is now and for many years past has been violating the provisions of section 6 of the Raker Act by selling Hetch Hetchy energy to the Pacific Gas and Electric Company for distribution to consumers [resale]. . . ." (R. 271:6-11)
>
> Board to Secretary, March 30, 1937: ". . . This Board believes that the agency contract under which City is now acting is fully in accord with the Raker Act". (R. 273:14-17)
>
> Secretary Ickes to the Attorney General, April 2, 1937: ". . . San Francisco was granted the right to construct the Hetch Hetchy Project. . . . Numerous conditions are placed on the grant, among them being one which prohibits the sale of power generated by the grantee on the project for the purpose of resale by the purchaser" etc. (R. 275:15-23)

This action was commenced April 27, 1937, twenty-five days from the last quoted letter of Secretary Ickes to the Attorney General.

We submit that the foregoing shows beyond peradventure that whenever it had occasion to consider Section 6 in the period 1913-1937, the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale, and nothing more.

We now proceed to show that in its complaint and in all proceedings in this action in the courts below, the Depart-

ment of Justice has maintained the position that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that act merely because it was a contract of sale for resale and not a contract of agency; that the District Court, accepting the theory of the Government, so held, and that the Department of Justice did not abandon its said position when, for the first time four months after the final hearing, and on February 26, 1938 it first argued that Section 6 also forbids an agency of a particular type.

(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type.

To sustain the proposition just stated, we start with the Complaint filed April 27, 1937.

Complaint.

Paragraphs VIII, IX and XVIII of the Complaint read as follows (R. 6, 9, 39):

> "VIII. That defendant is now and since on or about June 29, 1925 has been enjoying using and occupying the said rights, easements and lands of plaintiff in evasion of and contrary to the aforesaid terms and conditions of said Act, more particularly section 6 thereof, in this that the defendant has since said date been and now is selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private cor-

poration for and with the purpose and intent that the said corporation resell the same to its customer consumers, including[9] the people of said defendant;"

"IX. That from time to time since June 29, 1925, the Secretary of the Interior has represented to defendant that its sale of said electric power to said Pacific Gas & Electric Company was in evasion of and contrary to the terms and conditions of said Act and has requested that defendant cease and desist from said practice;"

"XVIII. That under color of said Act the defendant will continue as aforesaid to wrongfully enjoy, use and occupy said rights, easements and lands, and to sell to said corporation for resale the electric power thereby and thereon generated, and will thereby continue to defraud and damage plaintiff, unless and until restrained by your Honorable Court, and that the continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained;"

Government's Opening Statement at Final Hearing.

In the opening statement at the final hearing which occupied October 19, 20 and 21, 1937 (R. 189-192) the United States Attorney said:

"The issue is a simple one. The question is has the City and County of San Francisco violated the provisions of Section 6 of the Raker Act. If the evidence shows a violation by the City and County of San Francisco of the provisions of Section 6 of the Raker Act, the Government asks this Court to make a finding that this contract entered into on July 1,

[9]The word "including" was added by amendment filed June 25, 1937 (R. 39, ls. 1-3).

1925 between the City and County of San Francisco and Pacific Gas & Electric Company is a contract of sale, and is violative of the provisions of Section 6 of the Raker Act, and enjoining the City and County of San Francisco from continuing to sell power for purposes of resale pursuant to the terms of that contract to the Pacific Gas & Electric Company, or to anybody else." (R. 189:28-190:14).

"Briefly, that is the issue in this case: Is this contract entered into by the City and County of San Francisco on July 1, 1925, a contract of agency, a contract merely by which the City and County of San Francisco consigns to the Pacific Gas & Electric Company as its agent certain power for distribution, or is it a sale of power by the City and County of San Francisco to the Pacific Gas & Electric Company for a definite sum to be paid monthly and thereafter sold by the Pacific Gas & Electric Company to its consumers . . ." (R. 191:27-192:8).

". . . this contract is not a contract of consignment, and is not a contract of agency, but is a contract for the sale of the electric energy . . . to the Pacific Gas & Electric Company for the purpose of resale, and that the sale of this energy [the Government contends] to the Pacific Gas & Electric Company for the purpose of resale is violative of the provisions of Section 6 of the Raker Act." (R. 191:4-14).

Government's Position Through the Final Hearing.

This position was maintained by the Government throughout the final hearing, as illustrated by the following:

"The question before this Court, as I understand it, is whether this is an agency contract or whether it is not an agency . . ." (R. 341:6-9).

"If it is an agency contract and the P. G. & E. as the agent is serving the City and County of San Francisco instead of buying it might be that the Raker Act is not being violated." (R. 341:13-17).

Following the conclusion of the final hearing October 21, 1937, the Department of Justice filed its opening "Brief for Plaintiff" November 1, 1937. The Municipality filed its "Brief for Defendant" December 20, 1937, and the Department of Justice filed its "Reply Brief for Plaintiff" February 26, 1938.

Brief for Plaintiff (U. S.) November 1, 1937 (D. C.).

In the brief of November 1, 1937 it is repeatedly asserted that Section 6 of the Raker Act prohibits sale for resale, as follows:

"Section 6 of the Raker Act is a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale." (53:16-19)

"Section 6 of the Raker Act constitutes a prohibition or covenant against the sale of electric energy, generated by the defendant on the Hetch Hetchy project, to any private person or corporation for the purpose of resale." (53:20-24)

"The real question is whether the sale or disposition of that energy by the defendant under conditions necessarily contemplating its resale to consumers is in derogation of Section 6 of the Raker Act." (54:20-55:2)

". . . Section 6 prohibits the sale of electric energy to a private person or corporation, such as the Pacific Gas and Electric Company, for the purpose of resale." (56:10-12)

"It is submitted that the language of Section 6 is a clear and unequivocal prohibition against sale to a private person or corporation of the right to resell the electric energy generated on the Hetch Hetchy Project; a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale." (58:15-21)

"[Congress] prescribed in Section 6 that those lands could not be used for the generation or transmission of energy to be sold to a private party for resale." (60:4-7)

The portions of the brief which deal with the contract and wherein it is argued that it is one of sale for resale are here quoted as additional evidence that the Government therein maintained that Section 6 forbids sale for resale. The brief says:

Brief for Plaintiff (U. S.) November 1, 1937 (D. C.).

"In the disposition of electric energy under the contract of July 1, 1925, with the Pacific Gas and Electric Company, the defendant is selling Hetch Hetchy energy to the company for the purpose of resale as prohibited by Section 6 of the Raker Act." (67:22-27)

". . . the language of consignment is used throughout the contract of July 1, 1925, between the defendant and the Pacific Gas and Electric Company. If the contract truly be one of consignment or agency, then the power distributed to consumers by the company as a result of that contract is distributed for and on behalf of the defendant and the full transaction is one of sale directly by the defendant, acting through its agent, to the consumer." (67:28-68:7)

"... there can be no doubt that the contract is one of sale for resale rather than one of consignment or agency." (72:3-5)

"... the transaction is in fact one of sale to the company for the purpose of resale." (72:29-31)

"... there can also be no doubt that the transaction is one of sale to the company for resale." (75:8-10)

"... the transaction between the parties is actually one of sale for the purpose of resale." (78:24-25)

"It is respectfully urged that the foregoing authorities and arguments are conclusive in establishing:

...

2. That the Raker Act contains a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale; and

3. That the defendant is selling energy generated on the Hetch Hetchy project to a private corporation, the Pacific Gas and Electric Company, for the purpose of resale in direct violation of the statute." (83:9-25)

The foregoing extracts show that until the filing of the reply brief for plaintiff, February 26, 1938, the Government, without interruption, maintained that what San Francisco was forbidden to do by Section 6 of the Raker Act (and all that it was forbidden by that act to do in the pertinent circumstances) was to sell water or electric energy to any individual or private corporation for purposes of resale. Likewise, since the execution of the contract of July 1, 1925, the only question concerning the validity thereof has been whether it was an agency contract or contract of sale for purposes of resale. In other words, these were the only contentions upon which the

Government relied, in the one instance, through twenty-five years, and in the other at any time within the twelve years and over following the execution of the contract.

It would be extraordinary if, after this long lapse of time, there should suddenly arise any valid interpretation which the Government had so long overlooked.

(d) In its opinion, the District Court followed the argument of the Department of Justice that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that act because it was a contract of sale for resale and not a contract of agency. The Government's argument that agency is prohibited was noted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9), but was given no other consideration.

The District Court said:

"The chief issue to be settled by the court in the present controversy is this: Does the City's present disposal of electric power under the contract of July 1, 1925, made by the City and the Company, violate Section 6 of the Raker Act?" (R. 97:19-23; 23 F. Supp. p. 44, c. 2, lines 7-12).

Again:

"[The court must] turn to the agreement between the City and the Company to determine whether it is a contract for the sale of electricity for resale or a contract of agency whereby the City distributes its own power through an agent. . . . The Government has alleged that the City is not distributing energy through the Company as an agent, but is selling electricity to it for resale in violation of section 6 of the Raker Act. The City denies this allegation and contends that it has entered into an agency agreement whereby it distributes its own power." (R. 106:22-107:13; 23 F. Supp. p. 47, c. 1, line 45, to c. 2, line 10)

Again:

"[In Los Angeles Gas & Electric Corporation v. Los Angeles, 188 Cal. 307 (1922)] a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private companies. The agency contract under which the companies were operating was challenged. The question before the court, **as in this case,** was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that the city charter was not being violated." (R. 113:18-29; __ F. Supp. p. 49, c. 2, lines 19-33.)

Also:

"The contract of July 1, 1925 was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act [and] became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in section 6 of the act." (R. 95:19; 97:2; 23 F. Supp. p. 44, c. 1, line 1; line 40)

Immediately after the second of the above quotations from its Opinion, the District Court entered upon a consideration of the question whether the contract was one of sale or one of agency, and in a very extended review, held it to be a contract of sale for resale and not one of agency (R. 107:14-120:20; 23 F. Supp. p. 47, c. 2, line 1 to p. 51, c. 2, line 54), which of course would have been labor lost if the Court had

been of the opinion or had accepted the belated argument of the Government that the contract violated the Raker Act even though it was one of agency. Indeed, if Section 6 was violated by the contract of July 1, 1925, whether it was one of sale for resale or one of agency, the Department of Justice could have brought the action and pleaded the contract in its complaint (which it did not). The contract would then have been immediately seen to be unlawful because, upon the supposition just stated, it was invalid whether one of sale for resale or one of agency.

(e) The two briefs filed by the Department of Justice in the Circuit Court of Appeals on March 14, 1939 and July 10, 1939, maintained its position unbrokenly that Section 6 forbids sale for resale.

We need not go over these two briefs to establish the proposition just stated because we take the second of the two briefs as indicating the line of argument in the first, and the extracts from the latter brief, supra, pp. 4, 5, show that the Department of Justice therein repeatedly asserted that Section 6 forbids sale for resale.

We therefore submit that the proceedings in Congress and the positions of the Department of the Interior and the positions of the Department of Justice in this action show that all of them have interpreted Section 6 as one forbidding sale for resale, without more.

We now pass to the consideration of the meaning of Section 6 considered textually and without reference to any view expressed thereon in Congress, or in the Department of the Interior, or by the Department of Justice.

(4) The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale. In the discussion of this point we lay on one side Congressional debates and the interpretation put upon Section 6 in the Department of the Interior and by the Department of Justice in this action.

Brief for Plaintiff (U.S.) November 1, 1937 (D.C.).

We have heretofore quoted, supra, p. 16, and here quote again, from the Government's "Brief for Plaintiff", the first filed by it in the District Court November 1, 1937, where it is said (page 58):

> "It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale. **In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified.**"

This brings us to a consideration of the forty-nine words which make up Section 6. We emphasize the words because howsoever they may be construed they decide three of the four questions in the case stated supra, pp. 1-3. We seek to determine what the words mean.

> "Most of the difficulties in this world are caused by the improper use of words" (Socrates).
>
> "Half the controversies in the word are verbal ones and could they be brought to a plain issue, they would be brought to a prompt termination." (Newman. Oxford University Sermons, p. 149).

The frontispiece shows that the words were taken from Section 6 of The Owens River Grant to Los Angeles and those words were themselves dictated by President Theodore Roosevelt for insertion in the Los Angeles Grant.

The differences in words in these three forms may be helpful and we therefore contrast them.

Contrast of Section 6 of The Owens River Grant with President Theodore Roosevelt's Dictation, and Contrast of Section 6 of the Raker Act with Section 6 of The Owens River Grant.

The departures from President Theodore Roosevelt's Dictation in the drafting of Section 6 of The Owens River Grant to Los Angeles follow. The Dictation is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "[Sec. 6] That the City of Los Angeles is prohibited from ever selling or letting to any corporation or individual except a municipality, the right for ~~that~~ [such] corporation or ~~that~~ individual ~~itself~~ to sell or sublet the water [sold or] given to it or him by the City ~~for irrigation purposes~~."

The departures from Section 6 of The Owens River Grant to Los Angeles in the drafting of Section 6 of the Raker Act follow. Section 6 of The Owens River Grant is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "Sec. 6. That the ~~city of Los Angeles~~ [grantee] is prohibited from ever selling or letting to any corporation or individual, except a municipality [or a municipal water district or irrigation district] the right ~~for such corporation or individual~~[10] to sell or

[10]The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Theodore Roosevelt's Dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the five Hetch Hetchy Bills introduced in the House, 63rd Congress, 1st Session, 1913 by Mr. Raker, i.e., H.R. 112, 4319, 6281, 6914 and 7207; but were stricken from Section 6 of the then Bill (7207) on motion

sublet the water [or the electric energy][11] sold or given to it or him by the ~~city~~ [said grantee]."

In President Theodore Roosevelt's Dictation, in Section 6 of The Owens River Grant, and in Section 6 of the Raker Act, the language clearly shows and the words employed in each case are implicit with recognition of the fact that each of the municipalities was to engage in the sale of water and that San Francisco was to engage in addition in the sale of electric energy, all on a large scale and with lawful authority to do so.

In Section 6 of The Owens River Grant and in Section 6 of the Raker Act, Congress was making provision in respect of sales by the municipality involved (in each instance of water, and in the case of San Francisco of electric energy as well) to a corporation or an individual and in respect of each sale was prohibiting "a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed", (Govt. Supp. Br. C.C.A., p. 7, lines 10-15, quoted supra, p. 5).

The whole idea was that title of the Municipality to the water or electric energy should not pass to another (private corporation or individual) coupled with the right of that other to resell or sublet.

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of Representative Murray of Oklahoma, on August 30, 1913 (50 Cong. Rec. 3999). The change was agreed to by Mr. Raker, who said that the section meant the same whether the words remained or were stricken.

[11] "When this bill was being considered by the committee, I offered an amendment to Section 6, . . . by adding the words 'or electric energy'." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2 ft.)

The language employed in Section 6 of the Raker Act is to be treated as that of President Theodore Roosevelt. In 1906, seven years before the Raker Act was passed, he was expressing the idea that a sale or lease of water for irrigation purposes by Los Angeles should not carry a right to the buyer to resell or sublet. The President was not considering, so we think ourselves entitled to assume, any legalistic questions. It must be assumed that he was aware that a sale or lease of water without restrictions would afford the purchaser a right to resell or sublet. This he desired to prevent and he expressed the purpose in language different than would have attended a similar effort by an outstanding legislative draftsman of long professional and technical training. We submit however that the President expressed his purpose and that he made it clear that the prohibition was aimed at unrestricted sales and leases and that his words enjoined that sales and leases should carry limitations denying rights of resale or subletting, if, when and as necessary.

The Owens River Grant involved the generation of electric energy but there was no provision in the bill against sale or subletting thereof for resale or subletting. This was undoubtedly due to the circumstances under which the prohibition was formulated. It all turned on the question of the disposition of water for irrigation purposes. This was the concrete problem presented to the President and no account was taken by him of electric energy nor of water except for irrigation purposes.

When the prohibition was drafted for insertion in the Owens River bill (after the conference with the President) it was concluded that there should be a restriction against

sale for resale of all water whether for irrigation or otherwise, and accordingly, the words "for irrigation purposes" were stricken.

The prohibition is akin to a covenant against assignment or subletting in a lease; and akin to a deed, with building and other restrictions qualifying and restricting the general words of a grant and the enjoyment thereof.

The prohibition of Section 6 in the Raker Act of 1913 is to be interpreted as Section 6 of The Owens River Grant and the Dictation of President Theodore Roosevelt, both dating from 1906, would be interpreted.

The meaning of Section 6 of the Raker Act is clear if attention is riveted upon the concluding words of the provision which are ". . . . the water or the electric energy sold . . . to it [any corporation] or him [any individual] by the said grantee", i.e., San Francisco. These words presuppose sales by the Municipality and forbid the Municipality in connection with certain of its sales to pass to the purchaser the right himself to sell.

If a sale were made "to any corporation or individual", the prohibition applied, but if the sale were to "a municipality or a municipal water district or irrigation district", the prohibition did not apply.

We submit that the last clause in Section 6, read with the other language therein without the addition of implied words, clearly shows that the purpose of the section was to forbid sale by the Municipality for resale by the purchaser in the instances to which the prohibition applied.

If we add to the language of Section 6 the words supplied, supra p. 10, as upon an ellipsis, the meaning is made doubly certain.

(5) It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency nor to forbid the same (see Opinion of Circuit Court of Appeals, supra pp. 11 ft., 12 ft.). The argument for a latitudinarian construction of Section 6 contended for in the Petition for Certiorari is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that the Government has never contended to the contrary of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C.C.A. p. 8, quoted supra p. 7): concessions seemingly renewed by implication in Petition for Certiorari, p. 7, footnote 5, last line.

In the Circuit Court of Appeals the Government claimed that there were words in Section 6 which properly construed forbade a contract of agency. These words were "selling or letting" and "sold or given", particularly "letting" and "given".

The argument of the Government first advanced in the District Court four months after the final hearing in Reply Brief for Plaintiff (U.S.) February 26, 1938 (supra p. 6) "that even an agency agreement might be beyond the limitations imposed by Section 6 of the Raker Act" was

noted as just quoted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9) but no comment upon the soundness thereof was made. The case in the District Court was decided upon the theory upon which the complaint was brought, namely, that the contract of July 1, 1925 violated Section 6 of the Raker Act because it was a contract of sale for resale and that section forbade sale for resale.

We shall later deal with the Government's contention that there is language in Section 6 which should be construed to be a prohibition of agency, but, in the meantime, we wish to call attention to the concessions of the Government made in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that the Government has never contended to the contrary of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C.C.A. p. 8): concessions seemingly renewed by implication in Petition for Certiorari, p. 7, footnote 5, last line.

In considering these concessions it is to be remembered that the generation and consumption of electric energy are practically simultaneous. It cannot be said that one precedes the other by a moment of time. The ultimate consumer obtains the energy by throwing or turning on his switch or plugging his socket, or pressing his button, etc., which being connected with the generator in the power house, automatically causes the generation of the energy—the throwing or turning on of the switch or the plugging

of the socket or the pressing of the button, etc., the generation of the energy in the power house and the transmission to the consumer being practically simultaneous, as already stated.

The Newark station of the Company where the Municipality delivers its electric energy is forty miles from San Francisco (Vincent, R. 282:11). Electricity travels with the velocity of light, i. e., at the rate of 186,000 miles per second, and hence the time involved between Newark and San Francisco is 1/4650ths of a second.

In *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), speaking of electric energy, this Court noted that "the generation and transmission are apparently simultaneous and both respond instantaneously to the turning of a consumer's switch" (p. 165, syl. 1).

These views have the support of Dr. Robert A. Millikan, the famous American physicist, whose testimony is quoted in *South Carolina Power Co. v. South Carolina Tax Commission* (D. Ct. S.C., 1931), 52 F.2d 515, 523, c. 1, line 22, at p. 523, c. 1, line 45 to p. 524, c. 1, line 23).

Dr. Millikan's views have the support of Sir Joseph John Thomson, F.R.S., the great British physicist. See "Electricity" in The Encyclopedia Britannica, 14th Edition, Vol. 8, pp. 190, col. 1 and 304, col. 1.

With these characteristics respecting the generation, transmission and consumption of electric energy, it is pertinent to ask the question which follows:

If the Municipality may employ the Company as "an agent for transmission purposes" (see Petition p. 7, footnote 5), what type of agency is forbidden by the words of Section 6?

The Company transmits the energy of the Municipality to the switch of the consumer and the Government concedes that that may be done lawfully. The Government says, however, that the agent "sells the water or energy"; but this is not true in a legal or in any other sense. The Municipality has employed a distributor who makes the energy available to the consumer when he throws his switch and a sale occurs through the offer of the energy by the Municipality and the taking in thereof by the consumer.

There is nothing in Section 6 which says an agent may transmit but he must not bill the consumer nor collect from him.

There is one practical test to which the whole argument of the Government might be put. Let us assume that the Municipality was distributing its own energy in competition with energy distributed by the Company for its own account. Would the Raker Act prohibit the Municipality from employing a canvasser for business or an agent (corporate or individual) to sell its electric energy?

There is no warrant for the argument that Congress intended in Section 6 of the Raker Act to impose a requirement on the Municipality to engage in public distribution without the use of an agent. If it did so, of course it excluded the employment of any individual as an agent for the distribution of energy, and excluded the employment of any private corporation, even one which might build a distribution system, and have no energy of its own to distribute.

In challenging the power of the Municipality to sell its electric energy through the Company, as its agent,

the Government would seemingly thereby disqualify the Municipality from selling at all, inasmuch as a corporation, including a municipal corporation, such as the District of Columbia, "can act only by its agents or servants". (*Barnes v. District of Columbia*, 91 U. S. (1 Otto) 540, 545 (1876). See, also, *Dearborn v. Grand Lodge*, 138 Cal. 658, 663 (1903); *Scott Stamp Co. v. Leake*, 9 Cal. App. 511, 516 (1908); *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 617, 31 Pac. 367 (1892); 6A *Cal. Jur*, "Corporations", § 13, p. 60; § 642, p. 1131; 43 *Corpus Juris* "Municipal Corporations", § 235, p. 236; § 1186, p. 707.)

Moreover, it is contrary to all ideas to forbid one to act through an agent. "He who acts through another acts by himself". 1 McKinney New Calif. Digest p. 3. "Qui facit per alium, facit per se". 51 *Corpus Juris* 294.

If it were proper to say that some agencies are not prohibited but other agencies are forbidden, it would be necessary to find words in Section 6 to carry this new idea; in fact, the idea partakes of both a negative and a positive character, for although, if no agency is prohibited, there is no need to mention agency at all, nevertheless it is clear that if some are prohibited and others are not prohibited, the fact must be shown by language in the section at once positive and negative. There is no such language.

Passing this phase of the question, we return to the words of Section 6 out of which the Government seeks to spell a prohibition against agency, and in that connection, it is to be noted that Section 6 is a prohibitory law and those things only are forbidden which are specified as prohibited. The prohibition is levelled against "selling

or letting" alone; and nothing is forbidden which is not embraced within "selling or letting".

There is no prohibition against agency.

Section 6 merely prohibits the Municipality from "selling or letting". Therefore, there is no scope of language to sustain wider prohibition. Specifically there is nothing to justify the idea that agency is prohibited. The Circuit Court of Appeals so held (R. 674, line 15; 676, line 25; 106 F.2d 575, c. 1, line 19; 575, c. 2, line 49, quoted supra, pp. 11 ft., 12 ft.).

In support of this ruling we call attention to the four groups of three words each in Section 6, which we indicate by underlining below.

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The first group "selling or letting" furnishes the subject of the prohibition; "selling or letting" (something) is forbidden and that is all that is prohibited. "Selling or letting" does not need interpretation.

Letting is another way of saying leasing, which is doubly clear when we connect "letting" with the word "sublet" later appearing in the section. See opinion of Circuit Court of Appeals (R. 677, line 6; 106 F.2d 576, c. 1, line 5, quoted supra, p. 13, line 3).

The words "selling or letting" are to be tied to the words "sell or sublet". "Sell" is a second "selling"—it is resale; "sublet" is a second "letting".

The words "selling" and "letting" are plain and simple. They prohibit a "selling" with "the right to sell" [resell]. They forbid a "letting" with the right to "sublet". The prohibitions apply to water or energy "sold" [transfer of title for a consideration] or "given" [embracing say transfer of title without consideration].

The plain meaning of the section is that whatever interest in water or electric energy is passed on by the Municipality to a transferee shall be for that transferee's personal use ("buyer's own consumption")[12] and not to be by "it or him" transferred anew.

The prohibition is against "selling", i. e., against a sale, and against "letting", i. e., against a lease. In a sale "one

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[12] *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U.S. 165, (1915) involved a contract of sale where the vendee "bought the goods exclusively for purchaser's own use."

Fosburgh v. California & Hawaiian Sugar Refining Co., (CCA 9, 1923) 291 Fed. 29 dealt with a contract by a sugar refining company to sell sugar to a candy company wherein it was provided that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same".

An unlimited sale of a patented article is free from all restrictions and the purchaser is entitled to resell (*Keeler v. Standard Co.*, 157 U.S. 659 (1895); *Free Co. v. Bry-Block Co.* (D. Ct. Tenn. 1913) 204 Fed. 632) but suitable restrictions are very commonly employed to cut off any right to resell.

United States v. General Electric Co., 272 U.S. 476, 489 (1926) holds that the manufacturer of a patented article may seek to dispose of his product directly to the consumer.

Wines and liquors are sold "not to be drunk on the premises where sold" (*John Rapp & Son v. Kiel*, 159 Cal. 702, 704 (1911); see, also, *Sandelin v. Collins*, 1 Cal. 2d 147 (1934); *Bath v. White*, 3 C.P.D. 175 (1877-1878); 18 *Halsbury's Laws of England* 116.

transfers to another an interest in property". In a lease "one transfers to another an interest in property", but it is usually a lesser interest than is imported by a "sale". This is all shown in the law of real property and the illustrations may be adapted to personal property.

Holt v. City of Montgomery, 212 Ala. 235, 102 So. 49 (1924): "A lease is a . . . grant of an estate in land": *Waskey v. Chambers*, 224 U.S. 564, 565-566 (1912): "The right of a lessee is the same as that of a purchaser in fee".

The second group of three words in Section 6 above underlined are "sell or sublet". As we have just made clear, these words require no interpretation. In the context, "sell" refers to a second sale—a resale, and "sublet" to a second letting, i.e., leasing.

These words mean "[re]sell or sublet". Plainly, the word "sublet" means a second letting. The first letting is the one from the Municipality to X and the second letting would be one from X to Y, if allowed. So likewise in respect of the word "sell". That is a second sale; the first sale being from the Municipality to A, and the second sale being from A to B if allowed.

The Petition for Certiorari, with studied purpose, has nothing to say about the meaning of "letting . . . the right to . . . sublet" ["the water or the electric energy sold or given to it or him by [San Francisco] the said grantee"].

It has little to say about the prohibition against "selling . . . the right to sell" . . . ["the water or the electric energy sold or given to it or him by the said grantee"].

For the word "selling", as we shall later see, the Petition for Certiorari assiduously employs the word "granting" which was thought (so we submit) better to harmonize with its interpretation than the word "selling" which it finds in the section. In connection with the foregoing we desire to make the point, that both of the clauses have to be taken into account in the interpretation of the section; that the section deals with water and electric energy acquired from the municipality by X and in that connection prohibits the "selling [to him] . . . the right to sell"; and that it deals with water or electric energy when using the word "letting" and the word "sublet" and that the section deals with water and electric energy acquired by lease from the municipality by X and in that connection prohibits "letting . . . the right to . . . sublet".

The third group of words "sold or given" presents no difficulty. The word "sold", standing alone, could not give rise to discussion. This is equally true in respect of the word "given".

The word "given" first appeared in President Theodore Roosevelt's Dictation, where it was not associated with the words "sold or" but stood alone. The words "sold or given" appeared for the first time in Section 6 of The Owens River Grant.

The word "given", when used in the Dictation, clearly referred to the words "selling or letting" and meant as indicated by the supplied words which follow: "the water given [i.e., by way of sale or lease, as aforesaid] to it or him by the city" and referred to nothing else than the

act of "selling or letting" which was the correlative of the word "given".

The word "given" does not enlarge the prohibition of "selling or letting"; it merely identifies "the water or the electric energy".

Striking proofs that the words "sold or given" are words to identify "the water or the electric energy" arise from the statement of the Government that "The right to sell, granting of which is prohibited by section 6, is not the right to sell all water or energy from whatever source derived, but only the right to sell the Hetch Hetchy water or energy obtained from the City" (Govt. Supp. Br. C.C.A. p. 4, lines 3-7, quoted supra, p. 4); and that "the breach occurs not in the sale, but in transferring with it the right to sell" (Govt. Supp. Br. C.C.A. p. 9, lines 11-13, quoted supra p. 5).

The addition of the words "sold or" in Section 6 of The Owens River Grant did not alter the meaning of "given" as it stood in the Dictation; and that word referred to both "selling" and "letting", but inasmuch as sale is specifically mentioned, the effective function of the word "given" thenceforth was to be the correlative of "letting". Of course, when the word "given" stood alone in the Dictation, it had as correlatives both "selling" and "letting", but the draftsman of Section 6 of The Owens River Grant, with a passion for repetition or to make assurance doubly sure, added the words "sold or", thus giving us "sold or given". If the word "given" in this connection had no historical background and its meaning were doubtful, interpretation would attribute to it a definition akin or having relation to the word "sold", say, as

involving, transfer of title. The maxim of *Noscitur A Sociis* (46 Corpus Juris 496) would apply ("The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it")—a maxim akin to *Ejusdem Generis* (19 Corpus Juris 1255).

The word "give" has many meanings, but when it is read in the environment in which we find it here, it deals with transfer of title through "selling or letting".[13]

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[13] "The word 'grant' is synonymous with 'give'. (Webster's Dictionary)". *Gurnsey v. Northern California Etc. Co.*, 7 Cal. App. 534, 544 foot (1908). "Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept'." *Standard Oil Co. of Indiana v. United States* (C. C. A. 7, 1908), 164 F. 376, 390 foot; *United States v. Bunch* (D. Ct. Ark. 1908) 165 F. 736, 739 foot. "The word 'given' as used in statute modifying the rule in Shelley's case [such as Section 779, C. C. Cal.] means conveyed." (Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738, syl. (1919).)

"The word 'give' is as expressive of a transfer of title as the word 'sell'" (In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617, 622, c. 2, ls. 49-51 (1897)), and while in proper context, it would mean a transfer of title without consideration, it does not exclude a transfer of title upon consideration. Latimer v. Bruce, 151 Ga. 305, 106 S. E. 263 (1921) held that an answer alleged "a contract upon a valid consideration" although the promise alleged was that "he would give her the property". The opinion says that "the word 'give' as employed in the answer, when considered in connection with the context, does not denote a technical gift" (p. 263, c. 2 middle). In times past words of conveyancing were "to give, grant and confirm" land to A. If the consideration was money, the deed operated as a bargain and sale, and if not for money, it was good as a covenant to stand seised. Harrison v. Austin, 3 Mod. 237, 87 Reprint 154 (1793); Cheney's Lessee v. Watkins, 1 Harris & Johnson 527, 2 Am. Dec. 530 (1804); Young v. Ringo, 17 Ky. (1 T. B. Mon.) 30 (1824); Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406 (1871). In Carter v. Alexander, 71 Mo. 585 (1880) it was held that the word "give" in a contract so far as it was related to land should be taken in the sense of "convey".

Evenson v. Webster, 3 So. Dak. 382, 53 N. W. 747 (1892) held that the instrument under review was a grant, although the word used was "give".

The fourth group: Next, there can be no dispute about what is meant by the words "it or him" which constitute the fourth and last group of three words each underlined above. They refer and are to be tied to "any corporation or individual", so that they should be read—"it [any corporation] or him [any individual]."

With these four groups of three words each shown to be of clear and unmistakable import, and none of them giving rise to any prohibition of agency, nothing remains upon which the Government can base a claim that Section 6 did anything more than to prohibit sale for resale.

There are prohibitions in Section 6; the prohibitions go as far as they go and no farther; they forbid sale for resale; plain words are used and no interpretation of those words is needed. "The restraint upon alienation must not be exaggerated" as said in *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907), where it was held that a prohibition against sale of tribal lands by Indians did not forbid the cutting of timber for sale and the sale thereof.

(6) In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function" (298 U.S. 237). The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

Cutten v. Wallace (CCA 7, 1935), 80 F.(2d) 140. 143 footnote, assembles numerous cases to the point that

"where there is no ambiguity in words of statute, there is no room for statutory construction".

In *Wallace v. Cutten*, 298 U.S. 229 (1936) Mr. Justice Brandeis, affirming the judgment in the last case cited and speaking for a unanimous Court, said (pp. 236-237):

> "The Government argues that . . . the literal construction thus given [in the court below] to §6(b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act. . . .
>
> It would be inappropriate for us to discuss these, and other, arguments presented. The language of §6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said [by us in another case] . . . 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'"

The following is to like effect:

In *Seaboard Acceptance Corporation v. Shay*, 214 Cal. 361 (1931), the Court said (p. 365):

> "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used. . . . It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the legislature must be determined from the language of the statute."

The prohibition of Section 6 of the Raker Act is free from ambiguity and there is no room for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." (*Thompson v. United States*, 246 U.S. 547, 551 (1918).)
>
> ". . . in support of his contention, petitioner invokes history of the legislation, but that is not here permissible for the language and meaning of the statute in respect of the question under consideration are clear." (*Wilbur v. United States*, 284 U.S. 231, 237 (1931).)
>
> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." (*Helvering v. City Bank Co.*, 296 U. S. 85, 89 (1935).)
>
> ". . . as this court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive." (*Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).)
>
> "The terms of the act are free from ambiguity, and in such cases the courts are not at liberty to resort to or examine the proceedings in Congress." (*Jeu Jo Wan v. Nagle* (CCA 9, Opinion by Rudkin, C.J. 1925) 9 F.(2d) 309, 310, c. 1 top.)

"The applicable provisions . . . are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the act is unambiguous and its meaning plain, is to be gathered from the act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this act speaks for itself; it does not call for construction." (*Commissioner of Internal Revenue v. Adams* (CCA 1, 1931), 54 F.(2d) 228, 229, c. 2 foot.)

"There seemingly is no canon of statutory construction better settled than the one which forbids reference to Congressional Records or to statements of legislators except in cases where the language of the statute is doubtful, uncertain or ambiguous." (*United Electric Coal Companies v. Rice* (CCA 7, 1935, cert. denied 297 U.S. 714), 80 F.(2d) 1, 8, c. 2 foot.)

"The legislative intent must be gathered from the plain meaning of the words used in a statute." (Syl. *Durr Drug Co. v. United States* (5 CCA, 1938), 99 F.(2d) 757.)

Upon the foregoing authorities, we submit that in claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function" (298 U.S. 237). The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

(7) The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are some provisions of the statute to support them.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

United States v. Chase, 135 U. S. 255, 261 (1890).

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Hadden v. Barney, 72 U. S. (5 Wall.) 107 (1866).

"I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

Lord Tenterden, C. J. in *Brandling v. Barrington*, 6 B. & C. 467, 108 Eng. Rep. 523, 527 (1827).

"I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14."

Holroyd, J., *same case* (p. 527).

"The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act."

Crawford v. Spooner (1846), VI Moore 1, 13 Eng. Rep. 582, 585.

See, also:

Estate of Barnett, 97 Cal. App. 138, 142 (1929);

M'Cowan v. Baine [1891] App. Cas. 401, 409;

Tompkins v. First Nat. Bank, 18 N.Y.S. 234, 235 (1892).

(8) There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, nor that the congressional policy which underlies Section 6 is any broader than that expressed therein.

The Municipality did not possess and could not generate a supply of electric energy equal to the requirements of its inhabitants. The City energy is only about one-half of that required to supply the San Francisco load (Vincent, R. 295:4-6). The Municipality's maximum amount of energy is from 67,000 kilowatt hours (Vincent,

R. 295:26) to 73,000 or 74,000 (Vincent, R. 303:18). In winter evenings the peak load is about 225,000 (Vincent, R. 295:23) and the Municipality's contribution would therefore not amount at those times to one-third of the requirements.

"Nothing whatever is said in the Raker Act with reference to the acquisition or construction of a distributing system" (Opinion, C.C.A., R. 664, lines 5-7; 106 F.2d 571, c. 2 foot).

On July 1, 1925 "the City had no distributing lines or system and had not completed its transmission lines beyond Newark" but "it had constructed its power plants and had impounded water sufficient to generate a large amount of electric energy which would be wholly lost if the water, as it passed through the dam and canals of the Hetch Hetchy project, were not utilized for that purpose. In this situation, on July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy generated at the Moccasin power plant of the Hetch Hetchy project" (Opinion, C.C.A., R. 665, line 20 to 666, line 2; 106 F.2d 572, c. 1, lines 39-54).

All that the Company was to receive under the agreement was "compensation covering its operating expenses and use of capital"[11] (Opinion, C.C.A., R. 667, lines 16-17; 106 F.2d 572, c. 2, lines 47-49).

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[11]This was proved by the testimony of N. Randall Ellis, Chief Valuation and Rate Engineer for San Francisco, attached to the City Attorney's Office (R. 435). It is difficult to ascertain what portion of his testimony was stricken out and what portion remains but, at least, it can be said that the fact was proved, that it was pertinent, should not have been stricken, and for purposes of the petition for certiorari should be regarded as proved.

The price and terms under which the energy was to be distributed to the inhabitants of the Municipality are fixed by the language of the agency agreement, and the Municipality's absolute control over the situation is made doubly sure by the one day right of termination. The Company had no alternative but to furnish the additional electric energy, which added to the municipal energy, would equal the requirements of the inhabitants of San Francisco.

There is no manifestation of congressional purpose which would be set at defiance by this simple and unavoidable expedient.

The Petition contends that municipal energy "should be sold exclusively by the City directly to consumers" (Petition, p. 12, lines 21-22).

There is a marked difference between public ownership and public operation. Obviously, Section 6 does not command public operation and there are no prohibitive words therein which would drive the Municipality thereto, leaving it no alternative.

The words of Section 6 are to have the meaning which like words had in the letter of June 25, 1906, President Theodore Roosevelt to the Secretary of the Interior (R. 657-660), and in Section 6 of The Owens River Grant to Los Angeles.

We are dealing with words; we are engaged in finding their meaning. It is plain from the frontispiece that the words in Section 6 of the Raker Act have the date of 1906 and whatever those words meant when they were embodied in President Theodore Roosevelt's letter and in Section 6 of The Owens River Grant, they meant when they were

copied into Section 6 of the Raker Act. The Petition does not suggest that there is any provision in the Act applicable to the point in hand except the prohibition of Section 6, and we submit that what it meant in 1906 it meant in 1913.

Congress has power to adopt a legislative policy, and it alone has power likewise to determine just what concrete measures in line with that policy shall be enacted.

It is not for the Government to cast about for a legislative policy and then argue that unmistakable concrete enactments in line with that policy shall be enlarged so as to make them commensurate with the real or supposed legislative policy.

The idea that Section 6 required the Municipality to operate its own distributing system was rejected in the Opinion of Secretary Ickes as follows (R. 244:19-27):

Secretary Ickes' Opinion.

> "The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, **while true** (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment." (Underlining ours.)

The Petition quotes language used while the Raker Act was under discussion in the Senate, but none of the quotations had anything to do with the meaning of or the purpose to be covered by Section 6. These are so clear that they do not stand in need of interpretation or resort

to Congressional debates (see quotation from Brief for Plaintiff, United States, November 1, 1937, D. Ct., point 3, supra, pp. 16-17; point 4, supra, p. 40). Moreover, these debates cannot be resorted to in the circumstances here present (see authorities Point 6, supra, pp. 56-59).

(9) There is no sound argument in the Petition for Certiorari to overthrow the proposition (a) that it is the purpose of Section 6 to and it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency. With this being shown, nothing remains for us to do except to answer question third, supra, page 2, by showing that there is no remaining argument in the petition respecting the interpretation of Section 6 which, if sound, would call for a reversal of the decree of the Circuit Court of Appeals. Indeed, we expect to show there is no remaining argument at all.

(a) In considering the Petition for Certiorari it is necessary to have in mind the theories of the parties from beginning to end in the courts below. Hence we state them in a summary way.

From the beginning until after the final hearing in the District Court, the Government's theory of the case was (a) that Section 6 forbade sale for resale (without more); and (b) that the contract of July 1, 1925 was invalid because it was a contract of sale for resale. The Municipality agreed that Section 6 forbade sale for resale, but denied that the contract was one of sale for resale, and claimed it was one of agency. At the final hearing the sole question (disregarding defenses overruled by the District Court[15] and not dealt with in the Circuit Court of

[15]The opinion of the District Court classifies the positions taken in that Court by the Municipality as (a) a primary defense (R. 93:12; 23 F. Supp. p. 43, c. 1, line 28) and (b) secondary defenses (R. 93:24; 23 F. Supp. p. 43, c. 1, line 43). The over-

Appeals) was whether the contract was one of sale for resale or of agency.

Four months after the final hearing and in its closing brief, the Government made its new contention that Section 6 also forbade a contract of agency and that therefore the contract was invalid even if a contract of agency.

The District Court held that Section 6 forbade sale for resale and that the contract was one of sale for resale,[15] and entered its decree for the United States. It mentioned the argument of the Government that the section also forbade a contract of agency but it did not enter upon a consideration of the point.

Upon appeal, the Government and the Municipality agreed that Section 6 forbade sale for resale. The Government contended that it also forbade a contract of agency, which the Municipality denied. The Municipality reasserted its position taken in the District Court that the contract was one of agency and did not violate Section 6 inasmuch as the section did not prohibit a contract of agency.

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ruling of these secondary defenses was assigned as error and would have been properly considered by the Circuit Court of Appeals if it had not overruled the District Court in respect of the primary defense, which is the one here under consideration.

The Circuit Court of Appeals said in footnote 4 to its Opinion: "The City has made other contentions which, in view of the conclusions of this Court, are not necessary to consider" (R. 666, 106 F.2d 572).

[15]We are constantly considering whether the contract of July 1, 1925 was one of sale for resale. Had the contract been a contract of sale, it would have been one of sale for resale because obviously the Company was not receiving the energy at Newark for its own consumption. Therefore, if the contract were held to be one of sale, it would follow that it was one of sale for resale.

The position of the United States in the Circuit Court of Appeals was "that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City" etc. (Opinion, supra, p. 12).

The Circuit Court of Appeals accepted the argument of the Government "that the terms of Section 6 prohibit . . . sale for resale" but decided against its contention "that the terms of Section 6 prohibit . . . the creation of an agency by the City" etc. (Opinion, supra, pp. 11-13). The court also decided against the Government's contention that the contract was one of sale for resale and held it to be one of agency. Thus the Circuit Court of Appeals reversed the decree of the District Court.

In the Petition for Certiorari it is argued that Section 6 does not forbid sale for resale; that the terms of the section do not deal with sale for resale; and that "the 'selling' prohibited is not the selling of energy for resale but the selling of the right to sell energy" (Petition, p. 8).

We submit that the Government should not be heard to make this argument when it pressed the opposite argument on the Circuit Court of Appeals and there obtained a concurrence in its view. The case presented is not one merely of a point never raised before but one categorically in opposition to one maintained without interruption in both courts below. "This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it" (*Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380); and "He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here" (*Helvering v. Tex-Penn-Co.*, 300 U.S. 481, 498).

(b) In its Petition for Certiorari, the Government might have renewed its argument made in the Circuit Court of Appeals "that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City" etc. (Opinion, supra, p. 12), but there was a reason and an important reason why it did not do so; why it executed a volte face. The reason was that if Section 6 forbade sale for resale, that fact accounted for all of the words in the prohibition and there were no other words which it could seize upon to justify or to give countenance to the argument that the prohibition also covered a contract of agency. In other words, the Government recognized that it could not maintain that Section 6 prohibited agency if it conceded that it forbade sale for resale, because, as we pointed out below and do so again here (supra, point 5, page 45), the prohibition of sale for resale exhausts the content of the section, both of words and ideas. Therefore, the Petition declares (page 8 foot) that "the 'selling' prohibited is not the selling of energy for resale" (supra, p. 3).

(c) The only point ever in dispute respecting the nature of the agreement of July 1, 1925 was whether it is a contract of sale for resale or a contract of agency. There has been no suggestion that it was anything other than one or the other of these two. However, the artificiality of the argument of the Petition is masked in language inappropriate to the subject dealt with.

One would be quickly understood if he said A has appointed B his agent with authority to sell.

The language of the Petition (p. 8, lines 9-10) that the "City grants to a private corporation the right to sell

energy", when the fact is that the City made an agreement with a private corporation whereby the latter, as agent of the former, would perform the acts specified in the agreement, is far fetched, inexact and incorrect; yet it is repeated in one form or another seven additional times in the Petition at the pages and lines following: p. 2, line 21; p. 2, line 25; p. 7, line 25; p. 8, line 22; p. 9, line 2; p. 10, line 3; p. 13, line 7.

To say that in the agreement here involved, the "city grants to a private corporation the right to sell energy" (Petition, p. 8, line 9) is a caricature of language. It is likewise a falsification of the Municipality's contention to say that it argues that Section 6 "does not prohibit the granting of the right to sell energy as agent" (Petition, p. 10, lines 2-4). The Municipality's contention has never been expressed in such language. The Municipality's contention has been that Section 6 does not forbid a contract of agency; it has never expressed that contention by saying that the section "does not prohibit the granting of the right to sell energy as agent".

(d) In the Specifications of Error (Petition p. 7 foot) like misuse of language is to be noted. It is said that the Circuit Court of Appeals held that Section 6 "does not prohibit the granting to private corporations of the right to sell electric energy originating at Hetch Hetchy as agent for the City". The Court did not couch its conclusions in any such language nor in language which justified description thereof by the language quoted. The Court held that a contract of agency was not forbidden by Section 6 and said nothing about "the granting . . . of the right to sell . . . as agent for the City" as shown

in the Petition where it is said it (p. 4, lines 1-3) "reversed on the ground that the Act does not prohibit the sale of energy by the Company as agent for the City".

(e) The statements in the Petition that Section 6 "leaves no room for any exception under which the City may grant to a private corporation, for a consideration, the right to sell such energy as its agent" (Petition, p. 8, lines 21-24) and that "the prohibition applies to any arrangement whereby, for a consideration, the City grants to a private corporation any right to sell, in any capacity, energy made available to it from Hetch Hetchy" (Petition, p. 9, lines 1-4) are merely enveloping phrases to avoid a bald statement of a simple question, i. e., does Section 6 forbid an agency.

(f) In thus ringing the changes on and repeating the words "grant" or "granting", the Petition does not mention the fact (which it might have done) that **neither the word "grant" nor the word "granting" is contained in Section 6.**

The word which the Petition should have used on the eight occasions above mentioned was either the word "sell" or "selling". In other words, it should have spoken of "selling to the Company the right to sell energy", but seemingly, so we assume, the argument would lose caste if the Petition had used the word "sell" or "selling" in the place of "grant" or "granting" and it took the course frequently employed in hard driven arguments, i. e., to omit the true word and substitute a false one.

(g) The word "selling" in Section 6 contemplates a transfer of title. The Municipality says the section refers

to "selling" a commodity. The Petition argues that "selling" refers to "a right to sell". It would seem to follow that in such a case there would be a transfer of the right to sell. If the "grantor", however, only authorized the Company to sell in its name and upon its behalf, there would be only an agency and neither transfer nor "grant" of the right to sell; and the use of the word "grant" would be inapposite to the last degree. The Petition says that "the 'selling' prohibited includes any such grant, even though the legal title to the energy does not pass through the company" (p. 9, lines 5-7). This means, if it means anything, that selling does not pass title to the energy if energy is not the thing sold!!! It is necessary first to ascertain what the subject of the sale really is and next to determine whether legal title thereto does pass. If it does not, there is something wrong with the selling. Selling and the transfer of title to the thing sold are inseparable. If there is a selling of a right to sell, a transfer of the right to sell is implied. Therefore, if the circumstances show that a transfer of the right to sell is not intended but a mere authority, concurrent with the reserved right of the principal, then there is no grant of the right to sell and the whole argument falls to the ground.

In this connection it is not true, as stated in the Petition, that the argument of selling and transfer of title "is a strained construction of the Act" (Petition, p. 13, line 10); and one "which is hypertechnical at best, and which we believe to be clearly erroneous" (Petition, page 14, lines 3-4). The Petition says that the City "seeks to make the issue turn solely upon the question whether legal title

to the energy passes through the Company" (Petition, p. 10, lines 4-6), and that "any question relating to the title to the energy is wholly irrelevant" (Petition, p. 10, lines 8-9), and that the Act operates under the word "selling" "regardless of where the title to the energy lies" (Petition, p. 10, lines 14-15).

All of this turns on what is sold: is it energy or "the right to sell energy". If energy is sold, of course the title thereto passes, and if the right to sell is the thing sold, title to the right to sell is transferred, which is inconsistent with any idea of agency whereunder the agent is merely endowed with authority and the grantor reserves "the right to sell".

(h) While the Petition uses "grant" in describing what took place under the contract of July 1, 1925, it does take account of the word "selling" in dealing with the statute, and finds it necessary to supply a consideration for the selling, which it does, page 9, line 7, in the assumption in the agreement of an obligation by the company to furnish peak load and steam stand-by services and to pay a fixed minimum of energy each month, etc. Thus an agreement held to be one of agency wherein the agent agrees to perform certain duties is turned into a sale of "the right to sell" and the consideration supplied by covenants of the agent in the agreement. Thus the government is put to great straining to work out a sale, in connection with which, note may be taken of the following sections of the California Civil Code (in force until 1931 when superseded by the Uniform Sales Act), which clearly codified the general law as it then was and now is:

"1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."

"1804. Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only."

"1806. The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and a buyer as to that which he takes."

(i) The Petition wisely abstains from testing its argument by applying it to "letting . . . . the right to . . . . sublet".

The moment the word "sublet" is dwelt upon the whole purpose of the section is luminous because it presupposes a lease to A, say, of water or energy which he is not to be permitted to sublet. If instead of "sell or sublet" the words had been "resell or sublet" the argument in the Petition would never have been made (so we must assume), and yet, when we have the word "sublet", we are compelled to say that "sell" means "resell".

In one instance, the Petition (p. 10, lines 11-12) says "The City has sold to the Company a right to make such sales", but in all other instances (we speak subject to correction) the word "grant" or "granting" is used.

In order to have a balanced interpretation of the statute according to the point of view of the Government, the Government must deal with the provision in Section 6 of "letting . . . the right to . . . sublet", and by analogy to the above quotation would it not have to say "The

City has let (leased) to X the right to . . . sublet"? If it did so would it be possible to put any sense into such a sentence except to say that it meant that the City had leased a commodity to X but had withheld by proper restriction "the right to . . . sublet".

(j) The Petition, page 9, lines 18-27, rings the changes upon the word "given" found in Section 6, with the words "sold or". We have fully covered the history, meaning and significance of the word "given" and have shown that it is not a word of prohibition but merely identifies the commodity dealt in (supra pp. 53-55).

(k) The Petition argues that Section 6 forbade any disposition of water or electric energy except through sale "directly to consumers by the City" (Petition, p. 11, line 4); and adds (p. 13 top) "To make this purpose effective Congress used the peculiar language of Section 6—forbidding the 'selling' of 'the right to sell' energy". Kindred declarations appear at page 10, lines 8-11 and line 19; also page 8, lines 17-21; page 12, lines 19-27. There is no support for these declarations in the text of Section 6 nor in any other provision of the statute; and we again note that the Government does not claim that there is any provision of the statute dealing with the subject except Section 6. Furthermore, all these declarations overlook the fact that the language of Section 6 came to be employed in a comparable situation seven years before (1906-1913).

(l) In the Petition, page 4, line 17, the conditions of the Act are spoken of. Although the words "condition" and "conditions" appear in the Act on a number of occa-

sions, it is an undenied fact that there are no other conditions therein (one leading to forfeiture) except that contained in the proviso to Section 6 which declares that "the rights hereby granted shall not be sold . . . and in case of any attempt to [do] so . . . this grant shall revert to the Government of the United States".

The Complaint sought forfeiture but that claim was abandoned in the opening statement at the final hearing (R. 189-190).

(m) It is said (Petition, p. 13, lines 7-9) that "In granting to the Pacific Gas and Electric Company the right to sell the energy, the City has sought to circumvent this purpose". The City did not grant the right to sell; it created an agent with powers, and it did not seek to circumvent the purpose as is shown by its effort immediately after the execution of the agreement to have an authoritative ruling that the contract was one of agency and therefore not forbidden by the statute—a ruling that was not forthcoming until 1935, ten years after the execution of the agreement.

(n) The statement in the closing paragraph of the Petition, page 14, that direct competition by the Municipality with the Company would have an effect on rates for electric energy which "will be of direct concern to the entire population of that area" is far fetched and attenuated. The rates for private utilities are fixed by the Railroad Commission. It has, however, no jurisdiction of rates for electric energy to be charged by the Municipality. In this case, however, the Municipality agreed that the rates to be charged for its energy should be the rates fixed by the Railroad Commission.

(o) At no place in the Petition is there any indication respecting the issues and the questions as they arose below and it is impossible from the Petition, standing alone, to have a proper idea of the points which had been and were still in issue.

(p) The statement quoted from Solicitor Edwards' opinion (Petition p. 7, fn. 5) "that the Act clearly contemplates public ownership, sale and distribution" (R. 346) is misleading for the want of the words with which they were connected, which are "and not merely the development of water and power for sale to private concerns for resale and distribution. The legislative history of this law amply supports this interpretation of the language employed in the Act" (R. 346 foot-347 top).

(q) *Helis v. Ward*, ___ U.S. ___, Adv. Ops. October Term 1939, page 240, 242 (decided December 18, 1939) and the cases therein cited establish that "It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner". The Government does not ask Certiorari in respect of the interpretation put upon the agreement of July 1, 1925 by the Circuit Court of Appeals and it would seem that the mere statement of that question as one which it may later bring forward does not destroy the applicability of the rule stated in the cases mentioned. See supra, pp. 14-15.

(r) The Petition does not deal with the suggestion made by judges of the Circuit Court of Appeals at the oral argument May 19, 1939 that it might be held that the prohibition of Section 6 was not concerned with a sale of water or electric energy but prohibited "selling" ("leas-

ing" not mentioned) a franchise to sell ("sublet" not mentioned) (Opinion, R. 674-675, 106 F. (2d) 575, c. 1, pars. 12-13).

If this suggestion had prevailed a reversal of the District Court would have resulted with, we submit, dismissal of action "even if the contract of July 1, 1925 constituted a sale of electric energy to the Company to be resold by it to the inhabitants of the City" (Opinion, R. 675 foot, 106 F. (2d) 575, c. 2, lines 10-18) inasmuch as the City had not granted the Company any franchise to sell. Counsel for the City were of the opinion that the suggested interpretation of Section 6 was not the true one and would not endure and therefore dissented therefrom. The Government likewise dissented. Leave was given to the parties to file briefs following the oral argument which they did. In the briefs each of them insisted that it was the purpose of Section 6 to and it did prohibit sale for resale (see Extracts from Government's Supplemental Brief, supra, pp. 4-5).

(In the briefs filed before the oral argument, the parties were in agreement that Section 6 forbade sale for resale, without more, and the attention of the judges was not called to the genesis of Section 6 nor to the circumstance that it originated in the letter of President Theodore Roosevelt of June 25, 1906, nor that it had been copied from Section 6 of The Owens River Grant, which was done in the later briefs.)

The judges had in mind Article XIV, Section 1 of the California Constitution of 1879, which provides that "The use of all water . . . is hereby declared to be a public use, and subject to the regulation and control of the state,

in the manner to be prescribed by law" etc. (The section does not mention electric energy.) The text of Article XIV, Section 1, will be found in the Appendix to Govt. Supp. Br. C.C.A. p. 23.

The suggested interpretation of Section 6 would destroy all effectiveness for Section 6 as a few simple facts will show.

In the period 1918-1923, as has already appeared, supra, pp. 23-24, 26-27, the Municipality sold electric energy from the Early Intake plant to the Sierra and San Francisco Power Company, all within Tuolumne County, California. If Section 6 did not at the time prohibit sale for resale, then the Company became possessed of an unqualified title to the energy sold, and lawfully distributed it without any franchise or license from San Francisco; indeed, San Francisco did not have any authority to sell, grant or otherwise confer a franchise on the Sierra and San Francisco Company for operation in Tuolumne County.

Moreover, as the Municipality has Hetch Hetchy water and electric energy which it may sell at points along its lines which cross Tuolumne, Mariposa, Stanislaus, San Joaquin and Alameda Counties, California, the buyers in such instances would not need any franchise denominated as a "right to sell" emanating from San Francisco and unless the sale of the water or electric energy was restricted so as to forbid the buyer to resell, Section 6 would have no operative effect in the suggested cases.

Again, when the Raker Act was passed in 1913, the Spring Valley Water Company had the constitutional franchise provided in Article XI, Section 19 of the Cali-

fornia Constitution of 1879 to distribute water in San Francisco (*Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318 (1915)) which was in perpetuity and could neither be revoked nor impaired by any legislation, constitutional or statutory (*Russell v. Sebastian*, 233 U.S. 195 (1914)); and the Pacific Gas and Electric Company and the Great Western Power Company had franchises under the same constitutional provision to distribute electric energy in San Francisco.

Taking the case of the Water Company, the same observations being applicable to the electric companies, we note the following:

A distributor of water to a community for compensation, when acting as owner and not as agent, requires (a) ownership of water and (b) a franchise to distribute it.

If the owner of water (in this case the Municipality) can only sell that water to a distributor company or individual, for its own use and not for resale, the distributor is denied this source of supply. If on the other hand there are no restrictions upon the sale of the commodity, then the only question presented would be the question of franchise to sell. If, in that event, the distributor (corporation or individual) possessed a franchise, no difficulty would be encountered in marketing the commodity.

It is fair to assume that Congress was alive to the fact, for instance, that the Spring Valley Water Company had a franchise and that therefore the section would be nugatory if it were merely a prohibition against the granting of a franchise. (The Spring Valley Water Company was mentioned on a number of occasions in the debates which resulted in the Raker Act.)

The interpretation that Section 6 deals with franchises may be put to a very simple test. If following the approval of the Raker Act and water being available, the Municipality had sold all the water to the Spring Valley Water Company and the Spring Valley Water Company had distributed it with its own water, under its own constitutional franchise, could there have been any complaint (if we indulge in the assumption that Section 6 deals only with the grant of franchises)? Clearly not, for, in the events suggested, the City would have sold the water to the Water Company and the Water Company, as owner, would have made distribution under its own constitutional franchise. (In later years the plant of the Spring Valley Water Company was acquired by the Municipality and the distribution of water is wholly municipal.)

Take the present situation: If the contract of July 1, 1925 were treated as a sale, there would be no objection to it as one forbidden by Section 6, if we assume that the section deals only with the grant of franchises. The City does not purport in the contract of July 1, 1925 to confer a franchise on the Pacific Gas and Electric Company; it acted on the basis that the Company had authority to distribute.

It follows, then, that the interpretation of the prohibition of Section 6 as one merely against the granting of a franchise would strip Section 6 of all effective functioning.

(s) Finally, it is clear that no plain and common sense interpretation of Section 6 could ever lead to the contentions made in the Petition and quoted above and that these contentions do not overthrow or impair the propositions advanced, supra, i. e., in Points 4 and 5, pages 40, 45, re-

spectively, that it is the purpose of Section 6 to and that it does prohibit sale for resale and that it does not prohibit a contract of agency. We add there are no remaining arguments in the Petition respecting the interpretation of Section 6 which call for reversal of the decree of the Circuit Court of Appeals.

(10) It is submitted that under Rule 38, Certiorari should not be granted herein.

In addition to what we said, supra, pp. 2-3, we add the following:

Section 6 "is a restrictive provision inserted by the Government as grantor in a statutory conveyance" (Govt. Supp. Br. p. 19, lines 23-27).

This view found expression in Congress during the passage of the Act.

Representative Thomson, August 30, 1913:

> "This is not so much a legislative act or grant as it is a contract between the Government and San Francisco and these other cities, etc." (50 Cong. Rec. p. 3979, c. 1 foot.)

Senator Borah, October 4, 1913:

> "The Government is not undertaking to regulate and control the waters of the State of California, but it is simply attaching a condition to a specific grant which it is making to the city of San Francisco, as a proprietor and not as a sovereign." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Smoot, December 1, 1913:

> ". . . San Francisco can make appropriations of the water, and I understand she has already done so. . . . she must have an act of Congress authorizing her to

construct a pipe line over the public domain and build a reservoir. . . . That will give her all the rights Congress can give her.'" (51 Cong. Rec. p. 13, c. 1 middle.)

Senator Lippitt, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Brandegee, December 4, 1913:

". . . if the Government is the proprietor of land I have no doubt whatever of the power of the Government to sell its land or to grant any less estate than a fee simple under whatever conditions it may attach, which are, in my opinion, the same as those which any other proprietor of land may attach." (51 Cong. Rec. p. 183, c. 1 top.)

Senator Borah, December 5, 1913:

"I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land, and I have no doubt of the proposition that the Government can attach no other conditions that an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government." (51 Cong. Rec. p. 286, c. 2 middle.)

Whether the Raker Act is technically a private act or not is of no great consequence. It bears a close resem-

blance thereto. The subject of private bills and private acts is dealt with in the authorities below.[17]

There is no issue here of great general importance but merely a question of the construction of a statutory grant.

The Petition says (p. 8, lines 11-13) "the court below has passed upon an important question of federal law which has not been but should be settled by this Court". We submit that no important question of federal law is involved in the interpretation of Section 6 of the Raker Act.

The Government has no interest to be protected until the contract has been found to be of a character violating the Raker Act, and then its only interest is to annul the contract which would bring it no benefit and inflict great injury on the Municipality. (The Municipality has received for its energy (July 1, 1925-December 31, 1939) in excess of $30,000,000. The figure to December 31, 1937 was $26,000,000 (Vincent, R. 299), and if we add in excess of $2,000,000 per annum for two additional years, we have the figure stated.) This is under a contract which the Municipality has always had the right to cancel on one day's notice.

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[17]On the subject just stated see: *Halcomb's Private Bills* (1836) p. 1; *Potter's Dwarris on Statutes* (1885) p. 52, last line, and following; 1 *Clifford's History of Private Bill Legislation* (1885) p. 267; *Endlich's Interpretation of Statutes* (1888), p. 706, Sec. 503; 2 *Lewis' Sutherland Statutory Construction* (1904), p. 626, Sec. 322; p. 632, Sec. 327; *Craies on Statute Law*, 4th Edition (1936), pp. 59, 477, 488; "Statutes", 26 *Am. & Eng. Encyc. of Law* 531; "Statutes", 59 *Corpus Juris* 738, Sec. 325; "Parliament", 21 *Halsbury's Laws of England* 727, Sec. 1353.

Also *Campbell's Case*, 2 Bl. Ch. 209, 20 Am. Dec. 360, 369 (1829); *Great Eastern Railway Co. v. Goldsmid*, 9 App. Cas. (1884) 927, 936 top; *Herron v. Rathmines and Rathgar Commissioners* (1892) A. C. 498; *Croxall v. Sherrerd*, 72 U.S. (5 Wall.) 268, 285 ft. (1866).

The opinion of the Circuit Court of Appeals (footnote 2, R. 662, 106 F.2d 571) shows that the cost of the project, which was exclusive of a distributing system for electricity as estimated was $77,000,000. Evidence was given that the total amount of the bonds voted for the project was $89,600,000 but the evidence was later stricken out (R. 373, 453).

The Petition (page 13) speaks about preserving "the national parks inviolate from private commercial exploitation". No private commercial exploitation is involved. The Moccasin Power House is on privately owned property of the Municipality over seven miles from the Stanislaus National Forest and over twenty-three miles from the Yosemite National Park. The Moccasin Power House is ninety-six miles from the Company's substation at Newark. The Company's operations under the agreement do not involve any use whatever by it of public lands.

This would seem clearly to show that there is no pertinency in the statement in the Petition (p. 14, lines 4-8) that "Whether local and private interests may thus frustrate a plainly expressed Congressional purpose to protect the use of national parks against private exploitation is, intrinsically, an issue of great general importance".

The portion of the Hetch Hetchy development which occupies either easements over or public lands is shown by Defendant's Exhibit A. It also shows the properties utilized in the same project which are held by the Municipality in private ownership; and again it shows the land within the Yosemite National Park which had been owned by the Municipality and which the Municipality, by the terms of the Raker Act, was required to convey to the United States.

From this exhibit it may be seen, among other things, that the Moccasin Power Plant and the transmission lines from the latter to the Newark substation of the Company are upon lands held by the Municipality in private ownership.

The Answer of the defendant shows precisely what lands and interests in lands were obtained by the Municipality from the United States (see Paragraph III of Answer, R. 42-45).

(11) Conclusion.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

San Francisco, January 4, 1940.

GARRET W. MCENERNEY,
Counsel for Respondent.

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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

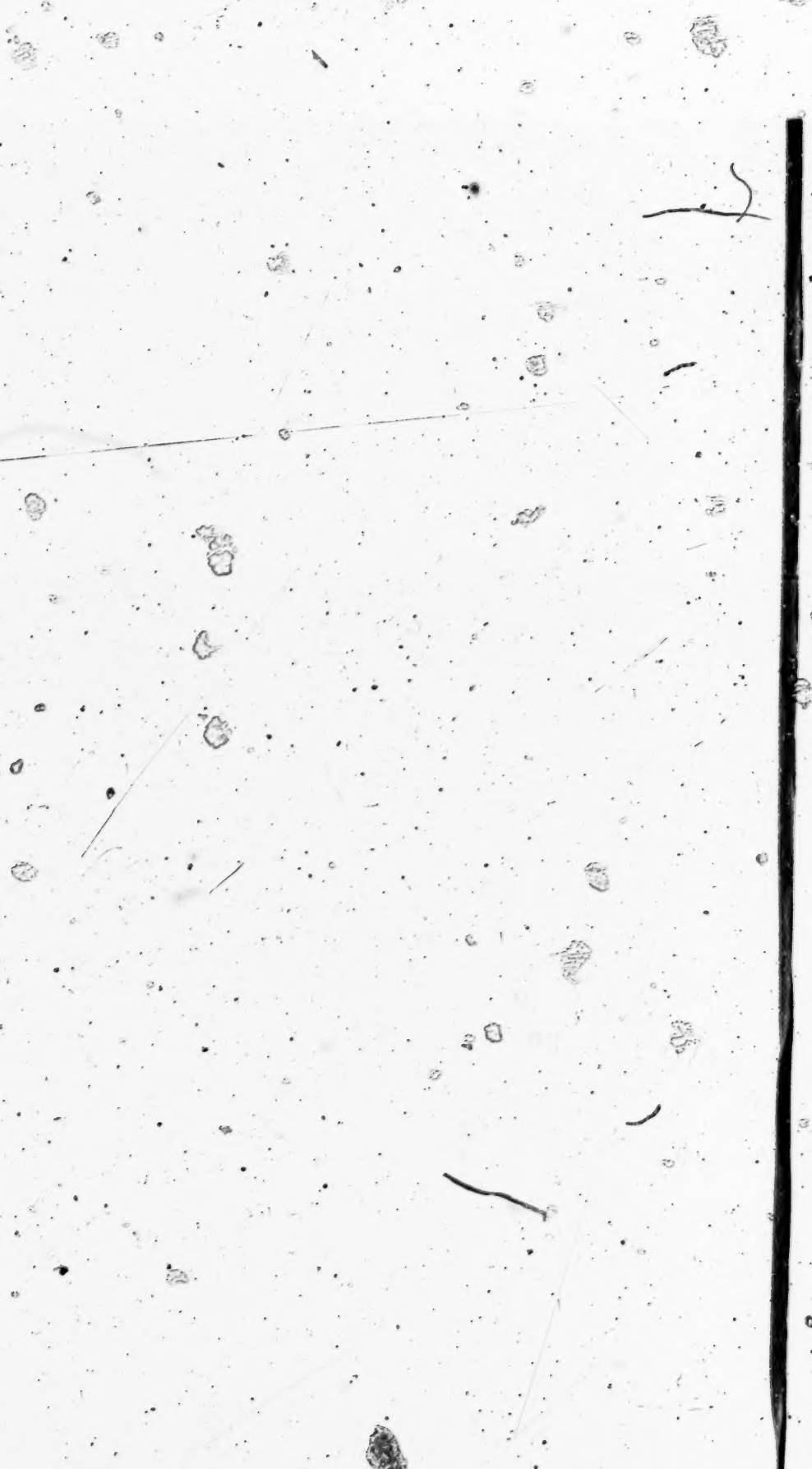
vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

JOHN J. O'TOOLE,
City Attorney of Respondent;
DION R. HOLM,
Assistant City Attorney of Respondent;
ROBERT M. SEARLS,
Special Counsel of Respondent;
GARRET W. McENERNEY,
Counsel for Respondent.



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The statute involved is Section 6 of The Raker Act, approved December 19, 1913 (38 St. 242, R. 12-36, 192-216) which reads as follows (R. 21, 201).:

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

(b) In dealing with Section 6, it is to be noted that the Raker Act is implicit with the idea that the Municipality is to sell or otherwise dispose of water and electric energy, and by explicit command of the Act, the Municipality is required to do so. In Section 6 it is presupposed that this will be done; and that presupposition is the base of the section which in consequence involves an ellipsis 3

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(h) The District Court concurred in the interpretation which the Government put upon Section 6, i.e., that it was the purpose thereof and that it did prohibit sale for resale; and while it made mention of the belated argument of the Government that the same section forbade a contract of agency (R. 120 ft. 23 F. Supp. p. 52, lines 3-9) it made no comment upon the soundness thereof 20

(i) The two briefs filed by the Government in the Circuit Court of Appeals on March 14, 1939 and July 10, 1939, maintained its position unbrokenly that

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(j) The opinion of the Circuit Court of Appeals states the claims of the parties to the appeal and its conclusions in respect thereof as below 23

(k) In its petition for certiorari, page 8 ft., the Government argued that "the 'Selling' Prohibited [by Section 6] Is Not the Selling of Energy for Resale", a proposition which was never before advanced in the case and which is in diametrical opposition to the positions taken by the Government throughout the litigation and in both of the Courts below 25

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1. The Government having uninterruptedly maintained the position in the Courts below that the case is controlled by Section 6 of the Raker Act and that the purpose thereof is to prohibit, and that it does in fact prohibit, sale for resale should not now be permitted in this Court to argue to contrary effect..... 54

2. The Government not having applied for certiorari to review the holding of the Circuit Court of Appeals that the contract of July 1, 1925, is one of agency and not one of sale for resale should not be permitted here to challenge that ruling..... 56

3. If it should be held that the Government may now claim (a) that there are other sections of the Raker Act which control the case in whole or in part; (b) that it is not the purpose of Section 6 to and that it does not prohibit sale for resale; and (c) that the contract of July 1, 1925, is one of sale for resale, the considerations which follow show (so we submit) that there is not any validity in any of the propositions thus stated..... 58

4. Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not

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require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice, nevertheless, these are brought to the attention of the Court to make it known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that it may be shown how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof..... 58

(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was had there. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a Prohibition of sale for resale (and nothing more)..... 61

Discussion of Section 6 in the House..... 61

(b) Whenever it had occasion to consider Section 6 in the period 1913-1937 the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale (and nothing more)..... 64

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(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale (and nothing more) and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type. Moreover, through the hearings in the District Court and in the Circuit Court of Appeals the Government continued to maintain that Section 6 forbids sale for resale 75

5. The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale, which fully appears without resort to Congressional debates or the interpretation put upon Section 6 in the Department of the Interior or by the Department of Justice in this action 76

6. It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency or to forbid the same. (See Opinion of Circuit Court of Appeals, R. 674; 106 F. (2d) 575, c. 4, lines 19-29; R. 676-677; 106 F. (2d) 575, c. 2, line 49 to 576, c. 1, line 2.) The argument for this latitudinarian construction of Section 6 contended for by the Government is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals (a) that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; (b) that it does

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not "prohibit employment of an agent for transmission purposes"; (c) that "the Government has never contended to the contrary" of either proposition; and (d) that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. CCA. p. 8, quoted infra, p. 81); concessions seemingly repeated by implication in Petition for Certiorari, p. 7, footnote 5, last line, and in terms renewed in Brief for the United States, p. 12, quoted supra, p. 20 80

7. In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function". (298 U. S. 237.) The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition 91

8. The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them 94

9. There is no merit in any other argument made in the Brief for the United States to overthrow the proposition (a) that it is the purpose of Section 6 to and that it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency 96

10. The contract of July 1, 1925 is one of agency and not one of sale for resale 109

(a) The intention of the parties to make a contract of agency is clearly and unequivocally manifested by the terms of the contract 110

(b) In drafting the agreement the parties were alive to the provisions of Section 6 of the Raker Act and intended to make the contract one of agency

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which they believed would be valid under the Raker Act, and not one of sale forbidden thereby 112

(c) There is no ambiguous provision in the contract, but if there were, it would be the duty of the court to interpret it, if possible, to make it lawful and not unlawful, and hence to sustain an interpretation that the contract is one of agency and not one of sale 114

(d) Not only did the parties have the general purpose to make the contract one of agency but in all of the provisions thereof they manifested this purpose 115

(e) Inasmuch as it has now been made clear (so we submit) that the parties intended from the beginning to the end to make a contract of agency which would not violate the Raker Act, and were not seeking to make a contract of sale which they knew would be invalid, because in violation of the Act, it is important here to point out that they did not fail of their purpose in the draftsmanship of the contract, and that there is no theory of interpretation which would lead logically to that conclusion 117

(f) The attendant circumstances reenforce the incontrovertible and undisputed fact that the parties throughout their negotiations and in the actual execution of the contract, and in the events which immediately thereafter transpired, manifested their purpose that the contract should be one of agency and lawful under the Raker Act and not one of sale which they knew would be prohibited thereby 119

(g) There is no justification whatever for the position taken in Brief for the United States, page 23, footnote 12, which would deny the applicability here of the rule that the intention of the parties to a contract must be effectuated based upon the false premise that the parties to the contract of July 1, 1925 "use terms to avoid the requirements of the law" and in the preparation of the

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contract sought evasion and avoidance of Section [redacted] of the Raker Act 122

(h) There is nothing in this case to justify the idea that by the contract the parties intended that the Municipality should "for a consideration" grant to the Company or endow it or vest in it a right to sell, nor that the consideration which the Government spells from the contract was intended to be such by either the Company or the Municipality 123

11. The seven points, 1 to 7 inclusive, upon which the Government rests its argument that the contract of July 1, 1925 is one of sale and, therefore, unlawful will be found, upon analysis, to be wanting in merit and to afford no justification for even the unsound method of interpretation put forward in the brief... 124

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12. The so-called findings of fact respecting the interpretation and meaning of the contract are not to be regarded as findings at all, considering (a) that questions respecting the construction of a contract are questions of law and not of fact, and (b) that the contract is plain and unambiguous and (as the Government conceded below) has been fully performed in all particulars, except one which arose ten years after the execution of the contract, and in respect of which the Government contends that the Company should in the years 1935, 1936 and 1937 have accounted to the Municipality for smaller sums than it actually accounted for in those years. Furthermore, there was no evidence extrinsic to the contract which in any manner varied the terms thereof, and hence

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any finding in conflict with the plain terms and legal effect of the contract is unsupported by the evidence and should be rejected, quite apart from the fact that the case being one in equity, the findings are at large in this Court 160

13. There is a clear and fundamental fallacy (so we submit) in the method which the brief employs in the interpretation of the contract to its destruction, by casting it, by construction, into a category which the Government argues makes it illegal whereas, if it were permitted to remain in the category in which the parties intended it to be, it would be effective and lawful 163

14. There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, or that the congressional policy which underlies Section 6 is any broader than that expressed therein 165

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15. There is no merit in any other argument made in the Brief for the United States to establish the contention that the contract of July 1, 1925 is not a contract of agency, or (as expressed by the Government) that it is a contract constituting a grant, upon a consideration, of the right to sell 174

16. Even if the contract of July 1, 1925 were in violation of Section 6 of the Raker Act, the Government would not be entitled to the relief which it here seeks..... 177

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Frontispiece.

THE GENESIS OF SECTION 6 OF THE RAKER ACT.*

June 25, 1906: President Theodore Roosevelt's Dictation for Inclusion in The Owens River Grant to Los Angeles (R. 657, 659-660).

"... that ... the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the City for irrigation purposes."

June 30, 1906: The Owens River Grant to Los Angeles (34 Stat. 801, 803).

"Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

April 7, 1913: Earliest Form of Section 6 of the Raker Act, H. R. 112, 63rd Congress, 1st Session.

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county."

December 19, 1913: The Raker Act (38 Stat. 242).

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

---

*We refer throughout to the first clause of Section 6.

PRESIDENT THEODORE ROOSEVELT'S DICTATION FOR INCLUSION IN THE OWENS RIVER GRANT; SECTION 6 OF THAT GRANT; AND SECTION 6 OF THE RAKER ACT READ DISTRIBUTIVELY.

President Theodore Roosevelt's Dictation.

Selling Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever selling . . . to any corporation or individual . . . the right for that corporation or that individual itself to sell . . . the water given to it or him by the City for irrigation purposes."

Letting Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever . . . letting to any corporation or individual . . . the right for that corporation or that individual itself to . . . sublet the water given to it or him by the City for irrigation purposes."

Section 6 of The Owens River Grant.

Selling Water:

"That the city of Los Angeles is prohibited from ever selling . . . to any corporation or individual, . . . the right for such corporation or individual to sell . . . the water sold . . . to it or him by the city."

Letting Water:

"That the city of Los Angeles is prohibited from ever . . . letting to any corporation or individual, . . . the right for such corporation or individual to . . . sublet the water . . . given to it or him by the city."

Section 6 of The Raker Act.

Selling Water:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual, . . . the right to sell . . . the water . . . sold . . . to it or him by the said grantee [San Francisco]."

Letting Water:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet the water . . . given to it or him by the said grantee [San Francisco]."

Selling Electric Energy:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual, . . . the right to sell . . . the electric energy sold . . . to it or him by the said grantee [San Francisco]."

Letting Electric Energy:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet . . . the electric energy . . . given to it or him by the said grantee [San Francisco]."

SECTION 6 OF THE RAKER ACT INVOLVES AN ELLIPSIS (SO WE SUBMIT), AND AS "THERE IS NO CANON AGAINST MAKING EXPLICIT WHAT IS IMPLIED" (UNITED STATES v. SISCHO, 262 U. S. 165, 169, OPINION BY MR. JUSTICE HOLMES (1923)), WE SUPPLY THE OMISSION IN FOUR DIFFERENT VERSIONS WHICH FOLLOW.*

The Ellipsis: Two Versions:

"Sec. 6. That [in selling or letting water or electric energy] [or] [in sales or leases of water or electric energy] the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Third Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Fourth Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to [re]sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

*See preceding three pages for genesis of Section 6, and for the reading thereof and of its prototypes distributively.

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

JURISDICTION AND OPINIONS BELOW.

Certiorari was granted January 29, 1940 (308 U. S.....) to review a decree of the Circuit Court of Appeals for the Ninth Circuit (R. 678)[1] reversing a decree of the United States District Court for the Northern District of California, Southern Division, (R. 168)[2] whereby an injunction was granted in favor of the United States and

[1]Opinion R. 661-677; 106 F.2d 569.
[2]Opinion R. 90-125; 23 F. Supp. 40.

against the City and County of San Francisco, forbidding the further execution of a day to day contract made by the latter July 1, 1925 with Pacific Gas & Electric Company for distribution of municipally owned electric energy to the inhabitants of the Municipality.[3] The decree and injunction of the District Court were based upon a ruling that the contract is one of sale for resale and not one of agency and, therefore, in violation of the statute involved.[4]

STATUTE INVOLVED.

We give below the text and add considerations properly to be taken into account therewith.

(a) The Text.

The statute involved is Section 6 of The Raker Act, approved December 19, 1913 (38 St. 242, R. 12-36, 192-216) which reads as follows (R. 21, 201):

> "Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."[5]

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[3] A copy of the Contract of July 1, 1925 is set out in the Appendix to this Brief pp. i to xii.

[4] In the opinion of the District Court this is stated to be the chief issue in the case. See R. 97, lines 19-23; 23 F. Supp. p. 44, c. 2, lines 7-12; R. 106, line 22 to 107, line 13; 23 F. Supp. p. 47, c. 1, line 45 to c. 2, line 10. The language of the District Court is quoted infra, pp. 20-22.

[5] Except where it is specifically stated otherwise, we refer throughout to the first clause of Section 6. The Government correctly noted in one of its briefs below: "The second clause of section 6, stated in the form of a proviso, plainly does not relate to the same subject matter as, or restrain, modify, or

(b) In Dealing With Section 6, It Is To Be Noted That the Raker Act Is Implicit With the Idea That the Municipality Is to Sell or Otherwise Dispose of Water and Electric Energy; and by Explicit Command of the Act, the Municipality Is Required To Do So. In Section 6 It Is Presupposed That This Will Be Done; and That Presupposition Is the Base of the Section Which in Consequence Involves an Ellipsis.

The Raker Act was designed (after making due provision for the prior rights of irrigation districts mentioned therein) to aid the Municipality in securing water and electric energy for its inhabitants. These commodities were to be sold by the Municipality, as will be noted in several provisions of the Act (Raker Act, Sections 1, 6, 9(l), (m), (n) and (o), in respect of electricity; and Sections 1, 6, 9(d), (l), (q) and (u) in respect of water).

It was on the basis of this dominant idea that Section 6 was introduced into the Act. In Section 6 it is presupposed that sales or other dispositions of both commodities will occur.

The section therefore involves an ellipsis[6] (so we submit) and as "there is no canon against making explicit what is implied" (*United States v. Sischo*, 262 U.S. 165, 169, opinion by Mr. Justice Holmes (1923)) we supply the omission in four different versions which follow.

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otherwise affect, **the first clause**. The word 'Provided' has no significance here, simply serving to separate or distinguish the two clauses" (Govt. Supp. Br. CCA, p. 18, line 30 to p. 19, line 3. See footnote 7 for reference to this and the other briefs of the Government filed below).

[6]Lippincott's Estate, 276 Pa. 283, 288, line 6, 120 Atl. 136, 137, c. 2 ft. (1923). See, also, Add. Br. Opp. Cert. p. 9 fn. 4.

In some instances, an ellipsis consists in the omission later of what had been expressed before; but the same rule is applicable of course where the omission of words is at the beginning but clearly indicated by what follows, as in the present case.

The Ellipsis: Two Versions:

"Sec. 6. That [in selling or letting water or electric energy] [or] [in sales or leases of water or electric energy] the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Third Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Fourth Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to [re]sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The words supplied by us above do no more than express the interpretation of Section 6 put upon it by the Government in the language quoted infra from its first and last briefs filed below.[7]

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[7]The Government submitted two printed briefs in the District Court, November 1, 1937 and February 26, 1938, and two in the

(c) The Position of the Government Below Respecting Section 6 Gave to it a Reading in Full Harmony With the Reading Which We Give the Section by the Addition of the Above Words Supplied by Us as Upon an Ellipsis.

Later, infra, pages 12-20, we give a full account of how the Government interpreted Section 6 below and show that its interpretation there always was in harmony with the reading which we give the section by the addition of the above words; but presently we do no more than quote from the first brief filed by the Government in the District Court and the last brief filed by it in the Circuit Court of Appeals.

Brief for Plaintiff (U.S.) November 1, 1937 (D.C.)

"It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale. In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified." (p. 58, lines 15-16, 19-23).

Govt. Supp. Br. C.C.A., July 10, 1939.

"The right to sell, granting of which is prohibited by section 6, is . . . the right to sell the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 3-7).

Circuit Court of Appeals, March 14 and July 10, 1939. The later entitled "Supplemental Brief for Appellee United States" is referred to as "Govt. Supp. Br. C.C.A. July 10, 1939". Certified copies of the four briefs are on file with the Clerk. Nine additional copies of each of them are also on file except of the first brief, that submitted in the District Court November 1, 1937, of which no additional copies were filed because they were not available.

"Congress was restricting the City in dealing in a proprietary capacity with water and energy obtained by the use of the property of the United States" (p. 4, lines 8-11).

"Sale for resale is prohibited" (p. 6, line 5).

"[Any suggestion which] implies that sale for resale under certain circumstances is not prohibited, is [untenable]" (p. 6, lines 6-8).

"Congress sought out the strongest terms it could find to prohibit a transfer by the City grantee to any private corporation or individual of an unrestricted ownership of the energy or water" (p. 6, line 27 to p. 7, line 2).

"Any sale or transfer by the City to such a corporation or individual must be of such nature that it does not carry with it the right to sell" (p. 7, lines 2 to 4).

"The statute clearly prohibits a sale which permits a resale, in other words, a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed" (p. 7, lines 10-15).

"The prohibition of the statute is against the granting to an individual or private corporation of the right to sell" (p. 8, lines 19 to 21) "the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 6 and 7).

"Section 6 of the Raker Act prohibits sale for resale" (p. 9, lines 4-5).

"The breach occurs not in the sale, but in transferring with it the right to sell" (p. 9, lines 11-13).

(d) The Genesis of Section 6.

Section 6 of the Raker Act was copied from Section 6 of The Owens River Grant to Los Angeles, approved June 30, 1906 (34 Stat. 801) which had been incorporated in that grant at the request of President Theodore Roosevelt and in words found in a dictated letter from him to the Secretary of the Interior dated June 25, 1906 (R. 657, 659-660), five days before the measure was passed and approved by him.

The Dictation of President Theodore Roosevelt and the language of Section 6 of The Owens River Grant to Los Angeles are as follows:

June 25, 1906: President Theodore Roosevelt's Dictation for Inclusion in The Owens River Grant to Los Angeles (R. 657, 659-660).

> "... that ... the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the City for irrigation purposes."

June 30, 1906: The Owens River Grant to Los Angeles (34 Stat. 801, 803).

> "Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

The differences in the language of the Dictation, The Owens River Grant, and The Raker Act are brought out in the contrasts which follow.

Contrast of Section 6 of The Owens River Grant with President Theodore Roosevelt's Dictation, and Contrast of Section 6 of the Raker Act with Section 6 of The Owens River Grant.

The departures from President Theodore Roosevelt's Dictation in the drafting of Section 6 of The Owens River Grant follow: The Dictation is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "[Sec. 6] That the City of Los Angeles is prohibited from ever selling or letting to any corporation or individual except a municipality, the right for ~~that~~ [such] corporation or ~~that~~ individual ~~itself~~ to sell or sublet the water [sold or] given to it or him by the City ~~for irrigation purposes~~."

The departures from Section 6 of The Owens River Grant in the drafting of Section 6 of the Raker Act follow. Section 6 of The Owens River Grant is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "Sec. 6. That the ~~city of Los Angeles~~ [grantee] is prohibited from ever selling or letting to any corporation or individual, except a municipality [or a municipal water district or irrigation district] the right ~~for such corporation or individual~~[8] to sell or

[8]The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Theodore Roosevelt's Dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the five Hetch Hetchy Bills introduced in the House, 63rd Congress, 1st Session, 1913 by Mr. Raker, i.e., H.R. 112, 4319, 6281, 6914 and 7207; but were stricken from Section 6 of the Bill then under consideration (7207) and which later became a law, on motion of Representative Murray of Oklahoma on August 30, 1913 (50 Cong. Rec. 3999). The change was agreed to by Mr. Raker, who said that the section meant the same whether the words remained or were stricken.

sublet the water [or the electric energy][9] sold or given to it or him by the ~~city~~ [said grantee]."

(e) The interrelation of President Theodore Roosevelt's Dictation and Section 6 of both The Owens River Grant and The Raker Act, and the meaning of the three forms, will be all the clearer if each of them is read distributively.

As will be noted supra, p. 7, neither the Dictation of President Theodore Roosevelt nor Section 6 of The Owens River Grant mentioned "electric energy" but both dealt with "selling" and "letting" "water".

Section 6 of the proposed Raker Act did not mention "electric energy" until those words were introduced therein late in the enactment of the measure, as shown in footnote 9. Thenceforth, the section dealt with "selling" and "letting" "water" and "electric energy".

Section 6 and Its Prototypes Read Distributively.

We give now each of the three forms if read distributively.

President Theodore Roosevelt's Dictation.

Selling Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever selling . . . to any corporation or individual . . . the right for that corporation or

[9]When this bill was being considered by the committee, I offered an amendment to Section 6, . . . by adding the words 'or electric energy'." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2 ft.)

The Bill thus amended in Committee at the suggestion of Representative Thomson was H.R. 6914, introduced July 18, 1913, which did not contain the words "or the electric energy" when introduced. The later Bill, H.R. 7207, introduced August 1, 1913, which became The Raker Act, did contain the words. Representative Thomson's amendment was therefore addressed to the earlier of these two bills.

that individual itself to sell . . . the water given to it or him by the City for irrigation purposes."

Letting Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever . . . letting to any corporation or individual . . . the right for that corporation or that individual itself to . . . sublet the water given to it or him by the City for irrigation purposes."

Section 6 of The Owens River Grant.

Selling Water:

"That the city of Los Angeles is prohibited from ever selling . . . to any corporation or individual, . . . the right for such corporation or individual to sell . . . the water sold . . . to it or him by the city."

Letting Water:

"That the city of Los Angeles is prohibited from ever . . . letting to any corporation or individual, . . . the right for such corporation or individual to . . . sublet the water . . . given to it or him by the city."

Section 6 of The Raker Act.

Selling Water:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual. . . . the right to sell . . . the water . . . sold . . . to it or him by the said grantee [San Francisco]."

Letting Water:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet the water . . . given to it or him by the said grantee [San Francisco]."

Selling Electric Energy:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual, . . . the right to sell . . . the electric energy sold . . . to it or him by the said grantee [San Francisco]."

Letting Electric Energy:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet . . . the electric energy . . . given to it or him by the said grantee [San Francisco]."

(f) The Several Hetch Hetchy Bills Introduced by Representative Raker in the 63rd Congress, 1st Session (1913).

As stated in footnote 8, Mr. Raker introduced five Hetch Hetchy Bills in the 63rd Congress, 1st Session. All of them were referred to the House Committee on the Public Lands and the proceedings in respect thereof appear in 50 and 51 Congressional Record.

The Bills were these (1) H.R. 112, introduced April 7, 1913; (2) H.R. 4319, introduced April 25, 1913; (3) H.R. 6281, introduced June 23, 1913; (4) H.R. 6914, introduced July 18, 1913; and (5) H.R. 7207, introduced August 1, 1913, which later became The Raker Act, approved December 19, 1913.[10]

After he had introduced the fifth Bill, which, following amendments, became The Raker Act, Mr. Raker explained that he had introduced these several Bills successively to

[10]The text of Section 6 in each of these five Bills is set out in the Appendix hereto, p. xviii. The first four Bills follow Section 6 of The Owens River Grant and do not involve any departures of consequence. The first of the Raker Bills, as introduced, which included in Section 6 the words "or electric energy" was the fifth.

take in amendments and suggestions which had been offered or were made in the intervals between the introduction of one bill and the next (50 Cong. Rec. p. 3900, c. 1 foot). After introducing the second of these five Bills (H.R. 4319, April 25, 1913) Mr. Raker on May 29, 1913 (50 Cong. Rec. 1825, c. 1 ft.) asked "unanimous consent to have printed in the Record, in parallel columns, the bill H.R. 4319 and the grant to Los Angeles, so as to show a comparison of the two, with a summary of points of difference between the two bills", which was given. Thereupon the two measures, The Owens River Grant (34 St. 801) and H.R. 4319 were printed in the Record in parallel columns under the entitlement "A statement showing that the proposed grant to San Francisco of right of way privileges through the public lands for the purpose of a municipal water supply as contained in House Bill 4319, introduced in the House of Representatives April 25, 1913, is substantially the same as the grant made by Congress to the City of Los Angeles for its municipal water supply" (50 Cong. Rec. p. 1825-27).

Section 6 of The Owens River Grant and Section 6 of the proposed grant to San Francisco and all other corresponding sections were printed in juxtaposition.

(g) Throughout the Course of This Action in the District Court, the Government Maintained an Interpretation of Section 6 in Full Harmony With the Reading Which We Give the Section After Supplying the Omitted Words as Upon an Ellipsis, Supra, p. 4.

We start with the Complaint filed April 27, 1937, to which a copy of the Raker Act was attached as an exhibit. No copy of the Contract of July 1, 1925, was attached. We assume that a copy of the Contract was

omitted against the possibility that if pleaded the case might have gone off on motion to dismiss through a ruling that the contract was one of agency and did not violate Section 6 of the Raker Act which forbade sale for resale and nothing more. The absence of the Contract from the Complaint, however, serves to accentuate and brings out in striking relief the theory of the action, i. e., (a) that Section 6 of the Raker Act forbade sale for resale; and (b) that the contract under attack was one of sale for resale.

The following are pertinent provisions of the complaint:

Complaint.

Paragraphs VIII, IX and XVIII of the Complaint read as follows (R. 6, 9, 39):

"VIII. That defendant is now and since on or about June 29, 1925 has been enjoying using and occupying the said rights, easements and lands of plaintiff in evasion of and contrary to the aforesaid terms and conditions of said Act, more particularly section 6 thereof, in this that the defendant has since said date been and now is selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private corporation for and with the purpose and intent that the said corporation resell the same to its customer consumers, including[11] the people of said defendant;"

"IX. That from time to time since June 29, 1925, the Secretary of the Interior has represented to defendant that its sale of said electric power to said

[11]The word "including" was added by amendment filed June 25, 1937 (R. 39, ls. 1-3).

Pacific Gas & Electric Company was in evasion of and contrary to the terms and conditions of said Act and has requested that defendant cease and desist from said practice;"

"XVIII. That under color of said Act the defendant will continue as aforesaid to wrongfully enjoy, use and occupy said rights, easements and lands, and to sell to said corporation for resale the electric power thereby and thereon generated, and will thereby continue to defraud and damage plaintiff, unless and until restrained by your Honorable Court, and that the continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained;"

Government's Opening Statement at Final Hearing.

On July 20, 1937, the Municipality filed its Answer to the Complaint (R. 41-90), with a copy of the Contract of July 1, 1925, attached as an exhibit (R. 76). Thus the contract was before the Court at the time of the final hearing in the District Court which occupied October 19, 20 and 21, 1937 (R. 189-192). In making his Opening Statement the United States Attorney said:

"The issue is a simple one. The question is has the City and County of San Francisco violated the provisions of Section 6 of the Raker Act. If the evidence shows a violation by the City and County of San Francisco of the provisions of Section 6 of the Raker Act, the Government asks this Court to make a finding that this contract entered into on July 1, 1925 between the City and County of San Francisco and Pacific Gas & Electric Company is a contract of sale, and is violative of the provisions of Section 6 of the Raker Act, and enjoining the City and County of San Francisco from continuing to sell power for

purposes of resale pursuant to the terms of that contract to the Pacific Gas & Electric Company, or to anybody else." (R. 189:28-190:14).

"Briefly, that is the issue in this case: Is this contract entered into by the City and County of San Francisco on July 1, 1925, a contract of agency, a contract merely by which the City and County of San Francisco consigns to the Pacific Gas & Electric Company as its agent certain power for distribution, or is it a sale of power by the City and County of San Francisco to the Pacific Gas & Electric Company for a definite sum to be paid monthly and thereafter sold by the Pacific Gas & Electric Company to its consumers . . ." (R. 191:27-192:8).

". . . this contract is not a contract of consignment, and is not a contract of agency, but is a contract for the sale of the electric energy . . . to the Pacific Gas & Electric Company for the purpose of resale, and that the sale of this energy [the Government contends] to the Pacific Gas & Electric Company for the purpose of resale is violative of the provisions of Section 6 of the Raker Act." (R. 191:4-14).

Government's Position Through the Final Hearing.

During the final hearing the Government offered in evidence the Contract of July 1, 1925 (R. 223) and it was marked "U. S. Exhibit 6", the text whereof appears in the Appendix to this Brief, p. i. Later, the United States Attorney said:

"The question before this Court, as I understand it, is whether this is an agency contract or whether it is not an agency . . ." (R. 341:6-9).

"If it is an agency contract and the P. G. & E. as the agent is serving the City and County of San Fran-

cisco instead of buying it might be that the Raker Act is not being violated." (R. 341:13-17).

Following the conclusion of the final hearing October 21, 1937, the Government filed its opening "Brief for Plaintiff" November 1, 1937. The Municipality filed its "Brief for Defendant" December 20, 1937, and the Government filed its "Reply Brief for Plaintiff" February 26, 1938.

Brief for Plaintiff (U. S.) November 1, 1937 (D. C.).

In addition to the quotation from the Brief of November 1, 1937, supra, p. 5, dealing with the interpretation of Section 6, the following are to be added as affording like interpretation.

"Section 6 of the Raker Act is a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale." (53:16-19)

"Section 6 of the Raker Act constitutes a prohibition or covenant against the sale of electric energy, generated by the defendant on the Hetch Hetchy project, to any private person or corporation for the purpose of resale." (53:20-24)

"The real question is whether the sale or disposition of that energy by the defendant under conditions necessarily contemplating its resale to consumers is in derogation of Section 6 of the Raker Act." (54:29-55:2)

". . . . Section 6 prohibits the sale of electric energy to a private person or corporation, such as the Pacific Gas and Electric Company, for the purpose of resale." (56:10-12)

"It is submitted that the language of Section 6 is a clear and unequivocal prohibition against sale to a private person or corporation of the right to resell the electric energy generated on the Hetch Hetchy Project; a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale." (58:15-21)

"[Congress] prescribed in Section 6 that those lands could not be used for the generation or transmission of energy to be sold to a private party for resale." (60:4-7)

The portions of the Brief of November 1, 1937, which bear upon the interpretation of the Contract also carry by implication a like interpretation of Section 6. Accordingly, we quote as below:

"In the disposition of electric energy under the contract of July 1, 1925, with the Pacific Gas and Electric Company, the defendant is selling Hetch Hetchy energy to the company for the purpose of resale as prohibited by Section 6 of the Raker Act." (67:22-27)

". . . the language of consignment is used throughout the contract of July 1, 1925, between the defendant and the Pacific Gas and Electric Company. If the contract truly be one of consignment or agency, then the power distributed to consumers by the company as a result of that contract is distributed for and on behalf of the defendant and the full transaction is one of sale directly by the defendant, acting through its agent, to the consumer." (67:28-68:7)

"If, however, the contract is not truly one of consignment or agency, it is one of sale of the energy to the Pacific Gas and Electric Company and as such

it constitutes a violation of Section 6 of the Raker Act, for as such it clearly is a contract contemplating resale of the energy by the private corporation to the ultimate consumers, its customers. It is respectfully submitted that the contract is clearly of the latter type and that, consequently, a violation of the statutory prohibition exists." (68:7-16)

". . . there can be no doubt that the contract is one of sale for resale rather than one of consignment or agency." (73:3-5)

". . . the transaction is in fact one of sale to the company for the purpose of resale." (72:29-31)

". . . there can also be no doubt that the transaction is one of sale to the company for resale." (75:8-10)

". . . the transaction between the parties is actually one of sale for the purpose of resale." (78:24-25)

"It is respectfully urged that the foregoing authorities and arguments are conclusive in establishing:

2. That the Raker Act contains a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale; and

3. That the defendant is selling energy generated on the Hetch Hetchy project to a private corporation, the Pacific Gas and Electric Company, for the purpose of resale in direct violation of the statute." (83:9-25)

Reply Brief for Plaintiff (U.S.) February 26, 1938 (D.C.) wherein the Government for the first time suggested or made claim that Section 6 forbids a contract of agency and wherein that claim was made for the first time by anyone.

The brief of the Government filed in the District Court November 1, 1937 was followed by Brief for Defendant

(the Municipality) submitted December 20, 1937, wherein it was said (p. 22, lines 12-15):

> "The Government concedes (so we understand) that an agency contract does not violate the Raker Act but contends that the contract under review is not an agency contract."

Then came the Reply Brief for Plaintiff wherein, for the first time the Government made the contention that Section 6 forbids a contract of agency, and wherein as will be noted, the Government explicitly stated that this was a new contention. (Indeed it was one never before put forward.)

The brief said (pp. 17-18):

> "Section 6 of the Raker Act is violated by the selling or letting to the company of the right to sell power generated at Hetch Hetchy, whether or not accompanied by transfer to the company of title to the power itself. This argument may be regarded as a new contention on the part of the United States, particularly in view of the statement of the issue in the opening statement for the plaintiff [R. pp. 189-192, particularly R. 189:28-190:14, and R. 191:27-192:10, the pertinent quotations from which appear supra, p. 14]. It is, therefore, recognized and conceded that the defendant may file reply thereto as it may be advised."

The argument thus advanced was indeed "a new contention on the part of the United States" for it had never been brought forward or suggested before by the Government or anyone else. Moreover, the Complaint was not drawn on any theory having to do with agency because, as already stated, the Contract was not attached to the

Complaint as an exhibit and the allegations in respect thereof were all to the effect that the contract was one of sale for resale thereby excluding the idea that it contained anything respecting agency.

Note may be here taken, though it is somewhat anticipatory, that in Brief for the United States it is said: "While the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City it does contend" etc. (p. 12.)

(h) The District Court Concurred in the Interpretation Which the Government Put Upon Section 6, i.e., That It Was the Purpose Thereof and That It Did Prohibit Sale for Resale; and While It Made Mention of the Belated Argument of the Government That the Same Section Forbade a Contract of Agency (R. 120 ft. 23 F. Supp. p. 52, lines 3-9) It Made no Comment Upon the Soundness Thereof.

The District Court said:

"The complaint of the Government alleges that the City is presently selling the electric power, generated by utilization of the grants of the Raker Act, to the P. G. & E. for resale, and that such activity is in violation of the limiting provision of section 6 of the Act." (R. 93:5-10; 23 F. Supp. 43, c. 1, lines 19-25.)

"The City . . . sets up the contract with the Company as Exhibit 'A' of its answer as a primary defense for the activity which the Government contends is a sale for resale." (R. 93:10-13; 23 F. Supp. 43, c. 1, lines 25-30.)

". . . the Secretary must start proceedings through the Attorney General, if the Act is being violated by a sale of electricity to a private company for purposes of resale." (R. 96, ftn. 4; 23 F. Supp. 44, ftn. 4.)

"The chief issue to be settled by the court in the present controversy is this: Does the City's present disposal of electric power under the contract of July 1, 1925, made by the City and the Company, violate Section 6 of the Raker Act?" (R. 97:19-23; 23 F. Supp. p. 44, c. 2, lines 7-12).

Again:

"[The court must] turn to the agreement between the City and the Company to determine whether it is a contract for the sale of electricity for resale or a contract of agency, whereby the City distributes its own power through an agent. . . . The Government has alleged that the City is not distributing energy through the Company as an agent, but is selling electricity to it for resale in violation of section 6 of the Raker Act. The City denies this allegation and contends that it has entered into an agency agreement whereby it distributes its own power." (R. 106:22-107:13; 23 F. Supp. p. 47, c. 1, line 45, to c. 2, line 10.)

Again:

"[In Los Angeles Gas & Electric Corporation v. Los Angeles, 188 Cal. 307 (1922)] a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private companies. The agency contract under which the companies were operating was challenged. The question before the court, **as in this case**, was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that

the city charter was not being violated." (R. 113:18-29; 23 F. Supp. p. 49, c. 2, lines 19-33.)

Also:

"The contract of July 1, 1925, was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act [and] became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in section 6 of the act." (R. 95:19; 97:2; 23 F. Supp. p. 44, c. 1, line 1: line 40.)

Also:

"Section 6 does not permit a sale of electricity to a private corporation for purposes of resale." (R. 124: 25-27; 23 F. Supp. 53, c. 1, ls. 34-36.)

(i) The two briefs filed by the Government in the Circuit Court of Appeals on March 14, 1939 and July 10, 1939, maintained its position unbrokenly that it was the purpose of Section 6 to forbid and that it did forbid sale for resale.

We need not go over these two briefs to establish the proposition just stated because we take the second of the two briefs as indicating the line of argument in the first, and the extracts from the latter brief, supra, pp. 5-6, show that the Government therein repeatedly asserted that it was the purpose of Section 6 to and that it forbade sale for resale.

Furthermore, the position taken by the Government is well stated in the opinion of the Circuit Court of Appeals, to which we now come.

(j) The Opinion of the Circuit Court of Appeals States the Claims of the Parties to the Appeal and Its Conclusions in Respect Thereof as below.

The contentions are thus stated (R. 666, 106 F.2d 572, c. 2, lines 1 to 19 and footnote 4 of that Opinion):

"The claim of the United States is that the disposition of electric energy by the contract of July 1, 1925, is a sale of energy to the Company for resale purposes and, consequently, it is a violation of Section 6 of the Raker Act. It is also contended that even if the contract be construed as an agency agreement there is still a violation of the Raker Act by the City since it is claimed there was granted to the Company for a consideration the right as agent to sell the energy.

The City, on the other hand, contends that the contract between it and the Company was an agency contract whereby the Company was employed as agent of the City to distribute the electric energy for it and that such an agency contract does not violate Section 6 of the Raker Act." (Footnote 4: "The City has made other contentions which, in view of the conclusions of this Court, are not necessary to consider.")

The conclusions of the Court were these (R. 674, 106 F.2d 575, c. 1, lines 12-32):

"We conclude that there was no sale made by the City to the Company of the electric energy distributed to the customers in San Francisco and that the contract was one by which the City employed the Company to transmit the City's power to the consumers thereof in the City.

The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy

by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal.

We conclude that the City did not violate Section 6 of the Raker Act by making a sale of electric energy to the Company."

In another connection, the Court stated (R. 675:2-5; 106 F.2d 575, c. 1, lines 41-45):

"The United States contended at the hearing and in its opening brief that what was prohibited by Section 6 was a sale for resale purposes. This was not disputed by appellant in its briefs."

Again (R. 676-677; 106 F.2d 575, c. 2, line 26 to p. 576, c. 1, line 10):

"The City, in its brief submitted after the argument, contends that Section 6 of the Raker Act prohibits a sale of electric energy for resale. It states: 'The government and the municipality are agreed that Section 6 prohibits sale for resale.'

The United States, in its brief submitted after argument, states: 'The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City.'

It concedes, however, that the Act 'did not prohibit employment of an agent for transmission purposes.'

In view of the position of the City that the Act prohibits a sale for resale, we base our decision upon

the sole ground that the contract between the City and the Company was an agency agreement and not a contract of sale.

As to the contention of the United States, reasserted and amplified in its brief after argument, that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City for disposition of the energy on its behalf, it is sufficient to point out that what we have already said disposes of this question. We point out further, however, that there are no words contained in Section 6, supra, that are appropriate to prohibit such an arrangement. The United States relies much on the fact that Section 6 prohibits not only 'selling' the 'right to sell' but also prohibits 'letting' that right. But the term 'letting' in Section 6 obviously means leasing. This is clear by the use of the word 'to' between the word 'letting' and the words 'any corporation' in the section."

(k) In Its Petition for Certiorari, Page 8 ft., the Government Argued That "the 'Selling' Prohibited [by Section 6] Is Not the Selling of Energy for Resale", a Proposition Which Was Never Before Advanced in the Case and Which Is in Diametrical Opposition to the Positions Taken by the Government Throughout the Litigation and in Both of the Courts Below.

The proposition stated in the Petition, page 8 foot, that "the 'selling' prohibited is not the selling of energy for resale" was never before advanced in this case, and is diametrically contrary to the position taken by the Government in the District Court (1) in the complaint filed therein; (2) in the opening statement at the final hearing; (3) in its position stated anew by counsel through the final hearing (October 19, 20, 21, 1937) (in arguments

respecting the admission and rejection of evidence); and (4) in its two printed briefs there submitted November 1, 1937, and February 26, 1938; and to the position taken by the Government in its two briefs filed in the Circuit Court of Appeals, March 14 and July 10, 1939, notably the latter, i.e., "Supplemental Brief for Appellee United States" (Govt. Supp. Br. C. C. A.) and in oral argument in that case.

This is all made abundantly clear by the occurrences in the course of the action fully detailed in subdivisions (g), (h), (i) and (j) supra, pp. 12-22.

We shall later argue that in these circumstances the Government should not be heard here to make the argument thus made for the first time in the Petition for Certiorari and which is diametrically opposed to its position in both courts below throughout the course of this action.

(l) In Brief for the United States Filed March 8, 1940, the Government Renews Its Argument Thus Made for the First Time in the Petition for Certiorari and Claims That the Selling Prohibited Is Not a Selling of Energy for Resale. The Language Is Not Exactly the Same But the Plain Effect Is Identical.

In Brief for the United States, p. 18, it is said:

> "The 'selling' expressly prohibited is not the selling of energy, but the selling of the right to sell energy. The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased."

In other words, the Government argues that the section does not prohibit selling energy for resale but that

the prohibition against selling of the right to sell energy for which the Government now contends, is violated by a sale for resale. This is a proposition the very opposite of which was maintained by the Government throughout the course of the litigation from the commencement of the action to the filing of the Petition for Certiorari. We submit, infra, p. 54, that in these circumstances the Government should not be permitted to make the argument.

QUESTIONS PRESENTED.

There were five questions presented to the Circuit Court of Appeals.

(a) Whether it is the purpose of Section 6 of the Raker Act to and whether it does prohibit sale for resale. Upon this point the Government and the Municipality were in agreement that the Act had the purpose and the effect mentioned. (See Op. C.C.A. R. 676-677; 106 F.2d 575, c. 2, line 26 to p. 576, c. 1, line 10.) See Government's position quoted supra, pp. 5, 6.

(b) Whether Section 6 prohibits a contract of agency. The Government contended that it does and the Municipality contended that it does not. (See Op. C.C.A. R. 674, 106 F.2d 575, c. 1, lines 12-32; also R. 676-677, 106 F.2d 575, c. 2, line 49 to 576, c. 1, line 2.) (It will be recalled that this contention of the Government originated in the District Court with the filing of its Reply Brief, February 26, 1938, four months after the final hearing, and that the proposition had never been before advanced in the case and, indeed, had never been advanced by anyone.)

(c) Whether the contract of July 1, 1925 is a contract of sale for resale or a contract of agency. The Government contended that it is a contract of sale for resale, and the Municipality contended that it is a contract of agency. (See Op. C.C.A. R. 674, 106 F.2d 575, c. 1, lines 12-18. See, also, footnote 4, supra, p. 2.)

(d) Whether the other defenses set up by the Municipality, called in the opinion of the District Court, "secondary defenses" and overruled en bloc, are valid *in toto* or in part.[12] The Circuit Court of Appeals did not deal with these so-called "secondary defenses", saying that in view of its decision on the points with which it dealt it was not necessary to consider the other contentions of the Municipality. (R. 666, 106 F.2d 572.)

(e) Whether the District Court erred in its rulings on the admission and rejection of evidence and the striking out of evidence already received. All of these rulings were in favor of the Government and against the Municipality and were assigned as error on appeal to the Circuit Court of Appeals and were there properly for consideration. They were not considered, however, for the reasons given in respect of "secondary defenses" i.e. the Circuit Court of Appeals held that its decision on the points with which

[12]The opinion of the District Court classified the positions taken in that Court by the Municipality as (a) a primary defense (R. 93:12; 23 F. Supp. p. 43, c. 1, line 28), meaning thereby the defense that the contract of July 1, 1925 was one of agency and not one of sale for resale; and (b) secondary defenses. (R. 93:24; 23 F. Supp. p. 43, c. 1, line 43.) The overruling of these secondary defenses was assigned as error on appeal to the Circuit Court of Appeals and the ruling was properly there for consideration. Inasmuch, however, as it reversed the District Court in respect of the primary defense, consideration of the secondary defenses became unnecessary as noted in the opinion. (Op. C.C.A. footnote 4 thereof. R. 666; 106 F.2d 572.)

it dealt made it unnecessary to consider the other contentions of the Municipality. We here treat these rulings as a single question for purposes of convenience.

These same five questions are here for decision (1) unless it be held, which we submit it should be, that the Government is precluded from here contending that it is not the purpose of Section 6 to and that it does not prohibit sale for resale, contrary to the position consistently maintained by it below; or (2) unless it be held, which we submit it should be, that the Government is precluded from arguing that the contract of July 1, 1925 is not one of agency because in its Petition for a Writ of Certiorari, it did not seek a review of the ruling of the Circuit Court of Appeals upon this point, notwithstanding that it did say that the Circuit Court of Appeals erred "in failing to hold that the contract of July 1, 1925 between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act" (Petition, p. 8, lines 3-6). In that connection, however, it is to be noted that in its Petition the Government said that this specification "is not urged as a reason for granting the writ of certiorari, but is reserved for argument on the merits" (Petition, p. 8, footnote); and also that "if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City". (Petition, p. 2, footnote 1.)

If the Government is precluded from making argument on these two named matters, there will remain for decision here the question whether Section 6 forbids a contract of agency, and if it be decided that it does not, the case is at an end. On the other hand, if it be held that the statute does forbid a contract of agency or that the contract is one of sale for resale, the questions will remain (a) whether the so-called "secondary defenses" hereinafter considered are valid and defeat the action and (b) whether the rulings of the District Court in the admission and exclusion of evidence and in striking out evidence already received were improper and call for a reversal of the decree of the District Court in any event.

STATEMENT.

(1) The Action: Commencement and Nature Thereof.

April 27, 1937 (R. 36) the United States filed in the District Court its "Complaint for Injunction, Accounting and Compensatory Relief" (R. 2) against the City and County of San Francisco, to which a copy of the Raker Act approved December 19, 1913 (38 St. 242) was attached as an exhibit. (R. 12.)

The Raker Act granted to the Municipality lands and interests in lands in Yosemite National Park and Stanislaus National Forest and other public lands for the storage and conveyance of water for domestic purposes and uses and for the generation, sale and distribution of electric energy which are shown upon the Map introduced as the Municipality's Exhibit A (R. 222), supplemented by testimony relative thereto. (R. 305.) (See Map at end of this Brief.)

San Francisco had been active in seeking to obtain a mountain supply of water for a number of years, and to that end had acquired parcels of patented land within the Yosemite National Park and Stanislaus National Forest. (infra, pp. 43, 40-41; also see Map.)

Some of these lands were utilized in the project and those which were not used were conveyed to the Government pursuant to the Act. (infra, p. 40; also see Map.)

Other obligations were imposed by the Act upon the Municipality. Some of these were made necessary by the enjoyment of the grant and appropriately imposed as incident thereto; while others were clearly elements in the price paid by the Municipality for the grant including the annual statutory rental payable to the Government, which within the period December 19, 1913-December 19, 1938, totalled $350,000, and since the latter date continues at $30,000 annually in perpetuity (Raker Act, Sec. 7, R. 21:17-27). The provisions which impose obligations in the nature of elements in the price paid appear in the Appendix to this brief, pp. xxi to xxiii. (See also infra, pp. 38-40.)

At the final hearing in the District Court, Joseph James Phillips, Director of Property for the Municipality (R. 311) and R. B. Hansen, one of its civil engineers (R. 305) gave testimony (R. 558-564) that the value of the lands obtained by the Municipality from the Government was $244,139.45 (R. 559) and that the moneys paid to the Government and for work performed by the Municipality by the requirement of the Government totalled $2,702,607 including $1,250,000 paid by the Municipality to the United States in annual installments of $250,000 for the years 1932 to 1936 in lieu of the building of trails and the con-

struction of a road (R. 561), and also including $330,000, the annual statutory rental to December 19, 1937. (R. 561, 564.) After having been received subject to a motion to strike, the testimony was stricken out. (R. 557-564.) The ruling thus excluding the testimony was properly assigned for error and is here for consideration as will later appear.

The action was "instituted on behalf of the United States of America on direction of the Attorney General . . . pursuant to said written request [of the Secretary of the Interior] and under authority of the provisions of said Section 9(u) of said Act".[13] (Complaint R. 7, Par. XII.)

The complaint alleged that the defendant was then and had been "enjoying, using and occupying the rights, easements and lands granted by said Act for the purpose of generating and transmitting electric power for sale" (R. 6, Par. VII), and had been and then was "selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private corporation for and with the purpose and intent that the said cor-

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[13]The pertinent provision of Section 9, subsection (u) reads: "Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all of the conditions hereinbefore and hereinafter enumerated:

. . . .

(u) . . . That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

poration resell the same to its customer consumers, including the people of said defendant". (R. 6, Par. VIII.)

The complaint also alleged (R. 10, Par. XIX) that "defendant should render to plaintiff a full, true and accurate accounting of all said sales by them made of electric power to said Pacific Gas and Electric Company, and should pay over to plaintiff the profits thereof. The proceeds of any such sales made during the pendency of this litigation should by order of your Honorable Court be impounded or by said defendant paid into court".

The prayer was for injunction to forbid sale for resale, or failing that, to forbid defendant "from use and enjoyment of the rights now used and enjoyed by them [the defendant City, its officers, agents, servants and employees] under color of said Act for the purpose of development and transmission of electric power".

The fifth defense in the Answer (R. 69) was for a declaration

> "(a) that the plaintiff has not and has not had since they were first appropriated by the defendant, any proprietary right, title or interest in or to any of the waters referred to in the complaint or in this action, and has no right, title or interest in or claim upon or in respect of the moneys realized by the defendant from or through said waters; (b) that the plaintiff has no proprietary right, title or interest in or to the electric energy generated by the defendant by or through the use of the water aforesaid, and has no right, title or interest in or claim upon or in respect of the moneys realized by the defendant from or

through said electric energy generated by the defendant; (c) that under the Raker Act the plaintiff has no right of forfeiture in respect of any of the water appropriated and diverted by the defendant or energy generated by it, and no right of accounting in respect thereto, but that it is limited for remedies of any breach of obligation imposed upon the defendant by Congress and accepted by it, as provided in the Raker Act, particularly Section 9, subsection (u)."

In connection with this plea for declaratory relief, the Answer quoted Section 9, subsection (u), as in footnote 13, supra, and added Congressional debates respecting the provision whereby it was shown beyond all doubt (so we submit) that Section 9, subsection (u) controlled and that it was impossible in the face thereof to state a cause of action for forfeiture.[14] (R. 71 ft.-75 ft.)

At the opening of the final hearing, in the District Court October 19, 1937, counsel for the Government said (R. 189-190):

"I have been authorized to state to the Court that the Government is not seeking in this case and will not offer any evidence upon the subject of damages; neither will we seek an accounting of the City and

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[14]The only forfeitures in the Raker Act are in Section 5, which provides that a failure diligently to prosecute the work of construction contemplated in the Act etc. should entail forfeiture, and by the proviso in Section 6 forbidding a sale of the rights granted, and providing "this grant shall revert to the Government of the United States" in the event of a sale of the rights granted.

Inasmuch as the work of construction contemplated in the Act was long since fully completed, the provisions of Section 5 may be said to be functus officio.

County of San Francisco of any profits that the City and County may have made through the diversion of the electric energy generated on the Hetch Hetchy project.

The issue is a simple one. The question is has the City and County of San Francisco violated the provisions of Section 6 of the Raker Act. . . .

We are not seeking a forfeiture of the grant contained in the Raker Act. We are simply seeking an injunction restraining the violation by the City and County of San Francisco of Covenant 6 contained in the Raker Act."

Thenceforward the Government prosecuted the action as one to restrain the violation of a restrictive covenant. (*Oregon & Cal. RR. Co. v. United States*, 238 U.S. 393, reading from p. 419, line 34, "It appears, therefore" to p. 423, line 10.)

Restrictive covenants are usually if not always created in respect of property granted, but here the property involved, i.e., electric energy, was not granted by the United States to the Municipality but is generated by it—3% thereof (R. 291) at the Early Intake power house located on land within Stanislaus National Forest granted by the United States to the Municipality, and 97% thereof at the Moccasin power plant which is built on land not granted by the United States to the Municipality but acquired by the latter from private proprietors.

Neither the water nor the electric energy belonged to the United States and no interest in it was granted by the Government to the Municipality by the Raker Act. The

Raker Act merely gave rights and privileges in the public domain which enabled the Municipality to utilize the water rights owned by it and thereby to generate electricity.

The Government's position is that without "the lands, rights and privileges granted by the Raker Act" (R. 160:12) the Municipality could not have captured the water nor have generated the electric energy, and therefore the Municipality can be restrained "from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy" (R. 167:10) if it is violating the Raker Act.

Thus far in this Statement we have dealt with the action. We now deal with other matters necessary to a full understanding of the case.

(2) House Rept. No. 41, 63d Congress, 1st Session, 1913.

As stated, supra, page 11, Mr. Raker in the 63d Congress, 1st Session, introduced five Hetch Hetchy bills (H.R. 112, 4319, 6281, 6914 and 7207), all of which were referred to the Committee on the Public Lands. The last H.R. 7207 was introduced and referred on August 1, 1913. (50 Cong. Rec. 3023, c. 2 m.) Four days later, on August 5, 1913, Mr. Raker submitted the unanimous report of the Committee, recommending that the Bill do pass. (50 Cong. Rec. 3127, c. 2 ft.)

The Report, after an introductory paragraph, contains the text of H.R. 7207 in full (pp. 1-8) followed by "Analysis of H.R. 7207" (pp. 9-16), in which the substance of each provision is given in turn followed gen-

erally with interpolated comment. The Analysis is followed by matter of a miscellaneous character. (pp. 16-43.)

In the course of its passage, H.R. 7207 was amended. The "Analysis" is addressed to the provisions in the Bill as introduced and not as finally passed; indeed it is more accurate to say that the "Analysis" seems to have been drafted to accompany either H.R. 6281 or H.R. 6914 above mentioned, for in instances it does not deal with text introduced for the first time in H.R. 7207.

The "Analysis" was twice printed at length in the House proceedings of August 29, 1913. (50 Cong. Rec. 3909, c. 1 ft.; 3921, c. 2 m.) After H.R. 7207 had been passed in the House it went to the Senate and was referred to the Senate Committee on the Public Lands which in a one page Report (Senate Report, 63rd Congress, 1st S. No. 113, dated September 25, 1913) recommended that the bill do pass and said: "Reference is hereby made to House Report 41, first session Sixty-third Congress, which is a very full and complete statement with reference to the purpose and intention of this bill". House Report No. 41 was printed in full in the Senate proceedings of October 4, 1913 (50 Cong. Rec. 5450-5462) and is cited in Brief for the United States, p. 10, to a point with which we shall deal later. In the meantime, we draw upon the House Report for matters pertinent to this Statement.

(a) The Report shows that water and water rights involved in the Hetch Hetchy project were acquired by the Municipality from the State of California and not from the United States.

The "Analysis" says (p. 16):

"CITY OWNS WATER RIGHTS.

The city and county of San Francisco, under the laws of the State of California, has taken and performed all necessary acts to acquire, appropriate, and use the waters of the Tuolumne River, which has been done in strict compliance with the laws regulating the appropriation and use of waters in the State of California, and now has and holds a valid water right by virtue of its acts performed under the laws of said State."

The "Analysis" also says that "the bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water" (p. 9); and Section 11 of the law itself declares that it shall not be construed etc. "to affect or in any way to interfere with the laws of the State of California" etc. (R. 16.)

See Appendix, pp. xxvii to xxix, for proceedings in Congress showing that the Raker Act was not designed to grant water rights and that the necessary rights were already possessed by the Municipality.

See, also *Meridian Ltd. v. San Francisco*, 13 Cal. (2d) 424, 432, 433 (1939).

(b) Some of the considerations paid by the Municipality to the United States are set forth in the Report.

"Proviso 2 of section 4 requires the grantee to construct and maintain bridges and crossings" etc. . . .

"(The requirements of this section cause the grantee to expend a considerable sum in the improvement of the park and the forest reserve and make access to these public places easy and comfortable. The expenditure of this money for this purpose is a consideration, in part, for the grant.)" (Anal., p. 10.)

"Section 7 provides that for and in consideration of the grant the grantee shall make certain payments. . . . The theory of this section is that San Francisco is receiving certain privileges and benefits from the national park, and that the consideration is for the use of public lands now owned by the United States. The payments proposed will, it is estimated, amount to more money annually than is at present charged to private corporations under similar Federal conditions." (Anal., p. 11.)

"Paragraph (c), section 9, is a condition [etc.] . . . .

The benefit to the irrigation districts in this provision is that the landowners will receive the benefit of an investment of approximately $50,000,000 without being compelled to put up any part of the cost." (Anal., p. 13.)

"Paragraph (k), section 9, requires San Francisco to build a dam at least 200 feet high.

(This means that the city will expend from $500,000 to $1,000,000 in excess of initial expenditures necessary for its immediate needs. The intent is to build the dam high enough to provide adequate storage to meet the conditions of the grant, and is primarily a benefit for the irrigationists.)" (Anal., p. 14.)

"Paragraph (p), section 9, provides for the building of roads and trails in the Yosemite National Park as designated by the Secretary of the Interior.

. . . These roads will cost the city of San Francisco $500,000 to $1,000,000, and are to be turned over, free of charge, to the United States. This is one of the important considerations, and carries compensation to the Government for the rights of way granted." (Anal., p. 15.)

"Paragraph (t) [Section 9] requires the grantee to convey to the United States any and all tracts of land now owned by the city within Yosemite National Park or the national forest, which lands are not actually required for use under the provisions of this act.

(The City of San Francisco purchased private lands for the purpose of exchanging the same with the Government in lieu of that portion of the floor of the Hetch Hetchy Valley, which is not owned by the city. The purpose of this plan is to provide suitable and desirable camping places for visitors . . . and at the same time compensate the United States for lands to be submerged.)" (Anal., p. 15.) (See Map infra.)

Following the Analysis the matter below appears (p. 18):

"City Owns Hetch Hetchy Valley.

The city owns two-thirds of the floor of the Hetch Hetchy Valley, and also owns a portion of the dam site.

The city has spent $1,750,000 in the purchase of privately-owned rights in the Hetch Hetchy Valley and the Yosemite Park, and now asks Congress for permission to build a dam and for rights of way for conduits, pole lines, etc., over the public lands.

In creating this water system, the city agrees to supply water at cost to irrigationists, and will also

supply electric energy at cost to landowners in the Turlock-Modesto district.

The power potentiality of the stream is estimated at 115,000 horsepower in its ultimate development. It is proposed to develop this energy in 10,000 horsepower units, and use the power for public purposes in San Francisco and adjoining cities.

The following data, from the report of the Army engineers and from the testimony of the engineers before the Public Lands Committee, give the acreage of the proposed reservoirs: . . .

	Acres in reservoir site.
Hetch Hetchy	1,330
Lake Eleanor	1,443
Cherry Valley	960
Lands [acres] owned by San Francisco in Yosemite National Park	1,960.33
Lands [acres] owned by San Francisco in forest reserve	1,446.13
[Total]	3,406.46

Total area which will be flooded in three reservoirs, 3,373 acres. . . .

The ultimate cost of the project is estimated at $77,000,000. The initial cost for the first installation necessary to bring 200,000,000 gallons of water to the city is $37,500,000."

(c) The Report proceeds upon the assumption that the Government is acting as grantor in a statutory conveyance.

"The theory on which this bill is drawn is that the United States, having sole jurisdiction over the national park, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantee." (Anal., p. 9.)

This same idea is expressed in Govt. Supp. Br. C.C.A. page 19, lines 23-27, where it is said:

> "The Government has never contended that the provision under consideration here is stricti juris a condition; it is a restrictive provision inserted by the Government as grantor in a statutory conveyance."

(See Appendix, pp. xxix-xxxii, for proceedings in Congress showing that in the Raker Act the Government was acting as a proprietor and not as a sovereign.)

(d) Section 6, to which the comment in the Analysis is directed, is not in the form in which the section was enacted; and the comment is addressed to both provisions in Section 6 and not to the first one alone, which is the one with which we are dealing throughout this brief.

Section 6 of H.R. 7207 read as follows (H. Rept. 41, p. 4):

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

In the Analysis (p. 11) it is said:

> "Section 6 provides that the grantee is prohibited from selling or letting to any corporation or individual, except a municipality, a water district, or an irrigation district, the right to sell or sublet the water or electric energy sold or given to it by the grantee; it is provided also that the rights under the grant shall not be subject to sale, assignment, or transfer to any private person, corporation, or association.

(This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.)"

(e) The Report (p. 17) shows that at the time differences between parties in interest had been adjusted.

"For 12 years San Francisco has been endeavoring to procure a water supply from the Hetch Hetchy Valley.

The city's object was opposed until this year by the Spring Valley Water Co., the irrigationists of the Turlock-Modesto irrigation district, the promoters of several water schemes which the city did not want, and by a small group of men who based their objections upon love of nature and opposed the creation of a lake where a canyon now exists.

All this opposition, except that of the nature lovers, is withdrawn.

The city has arranged for an amicable condemnation proceeding to acquire the property of the Spring Valley Water Co.

The city has agreed to protect the prior rights of the irrigationists and will spend from $500,000 to $1,000,000 more than is required at this time to increase storage to guarantee water for irrigation."

(f) In the Report (H. Rept. No. 41) a minor position is given to electric energy, etc.

H.R. 7207 contained substantially all of the provisions respecting electricity or electric power or electric energy which are found in the Raker Act as enacted. In addition to those references and to like references in the Analysis, there are references in other parts of the Report to electric energy but they are casual and unimportant.

We have carefully read the whole of the Report and have assembled the references mentioned as follows, giving pages and lines: "incidental hydroelectric power plant" 9:12-13; "to prevent cold storage of power possibilities" 14:54; "will also supply electric energy at cost" 18:9; "The power potentiality of the stream is estimated at 115,000 horsepower . . . It is proposed to develop this energy . . . and use the power for public purposes in San Francisco and adjoining cities." 18:11-14; "no credit for power development" 19:24; "additional power possibilities" 20:14; "the opportunity for economical water power development" 22:23-24; "a greater amount of water-power than any other" 23:22; "California . . . needs this water . . . for power" 25:5-7; "waters might be used for irrigation purposes and for power purposes" 25:12; "for the development of power now going to waste" 25:62-63; "will also receive municipal power at a lower price" 27:33-34; "irrigation use . . . connected with the municipal and power use" 27:54-55; "the power development in the Hetch Hetchy" 29:39; "available water will be eventually used for irrigation or power" 33:51-52; "rights for power and irrigation were obtained" 34:49-50; "power transmission lines" 37:20; "necessary power-house sites and diverting or storage dam sites" 37:21; "San Francisco proposes . . . to furnish electric power at cost to the Modesto and Turlock irrigation districts and to municipalities situated therein" 37:42-53; "has agreed to furnish both districts with hydroelectric power at absolute cost" 38:59-60; "that the city be required to furnish them with hydroelectric power at cost" 39:4; "the maximum power that can be derived under this project" 39:10-11; "a much smaller power yield" 39:30; "the total power development of the

Hetch Hetchy project is 115,000 horsepower" 39:30-31; "the impracticability of developing any hydroelectric power from this source" 39:45; "the impossibility of generating any power through its use" 39:58-59; "a dam for water power purposes" 41:33; "light and power and electric current free of cost" 41:36-37; and "the largest possible amount of hydroelectric power is to be developed and distributed to the parties directly interested" 42:52-54.

(3) Defendant's Exhibit A (Map) (a reduced portion whereof is attached at the end of this brief) introduced at R. 222, gives the location of the various works which constitute the Mountain Division of the City's Hetch Hetchy project and shows which of them are located on lands granted by the Raker Act and which of them were acquired by the Municipality by purchase from private owners.

There are two power plants, one the Early Intake, which furnishes 3% of the total municipal power, and the other the Moccasin, which furnishes the other 97%; the locations of both plants are shown upon the Map.

The waters utilized at Early Intake come from (a) Lake Eleanor Reservoir (in the Park); (b) Eleanor Creek (in Park and Forest), and (c) Cherry Creek (in Forest); and flow into Cherry River, thence to Lower Cherry Diversion Dam near Early Intake where they are diverted by Lower Cherry Aqueduct into Early Intake Power House.

The waters utilized at Moccasin come (except a minor contribution) from Hetch Hetchy Reservoir (in the Park, partly on public and partly on privately owned lands) and flow (partly in Park and partly in Forest) in the Tuolumne River (partly through public and partly through privately owned land) 12.5 miles to a point (in the Forest) where they are diverted from the River by aqueduct 18.8

miles to Priest Regulating Reservoir (partly on public and partly on private land, in neither Park nor Forest); thence two miles (for greater part over private land, but a short distance over public land) to Moccasin Power House (on municipally owned land).

The works which are used in connection with the Hetch Hetchy Project are the following:

(a) (1) Hetch Hetchy (O'Shaughnessy) Dam and Reservoir, and (2) Lake Eleanor Dam and Reservoir in the Park.

(b) (1) Lower Cherry Diversion Dam on Cherry River; (2) Lower Cherry Aqueduct from above dam to Early Intake with extension to Early Intake Dam; (3) Early Intake Diversion Dam and Power Plant; (4) Aqueduct (wholly on private lands) from Early Intake Plant to Priest Regulating Reservoir in the Forest (14 miles of the Aqueduct is in the Forest and about 2 miles on public land and about 2.8 miles on private land outside the Forest); and (5) an overhead transmission line from Early Intake to Moccasin Power House (partly inside and partly outside the Forest);

(c) An overhead transmission line from Early Intake to Hetch Hetchy Dam (partly in Park and partly in Forest);

(d) (1) Priest Regulating Reservoir (partly on Government and partly on private land, all west of Forest); and (2) Aqueduct (2 miles) from Priest Regulating Reservoir to Moccasin Power Plant on Public Lands west of Forest. (A small part is on private land.)

(e) Moccasin Power Plant and transmission line across San Joaquin Valley and Coast Range Mountains to Newark (on municipally owned land).

(4) The Opinion of the Circuit Court of Appeals contains a statement of the facts without which any other would be incomplete.

We here refer to that portion of the Opinion of the Circuit Court of Appeals commencing with the words "Before dealing with the contentions of the parties" (R. 661 ft.) down to and including "In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof". (R. 666, lines 2-5.) The same matter appears commencing at 106 F.2d 571, c. 1, line 13, and concludes with the last line of column 1, page 572.

SUMMARY OF ARGUMENT.

1. The Government having uninterruptedly maintained the position in the courts below that the case is controlled by Section 6 of the Raker Act and that the purpose thereof is to prohibit, and that it does in fact prohibit, sale for resale should not now be permitted in this Court to argue to contrary effect.

In dealing with Section 6, it is to be noted that the Raker Act is implicit with the idea that the Municipality is to sell or otherwise dispose of water and electric energy; and by explicit command of the Act, the Municipality is required to do so. In Section 6 it is presupposed that this will be done, and that presupposition is the base

of the section, which in consequence involves an ellipsis and a reading of Section 6 as shown supra page 4. As thus read the section imposes only a restriction on sale for resale purposes, and this is shown to be the true reading of the section by its genesis found in (a) the Dictation by President Theodore Roosevelt for inclusion in The Owens River Grant to Los Angeles, (b) The Owens River Grant itself (34 Stat. 801), (c) the contrast of Section 6 of The Owens River Grant with President Theodore Roosevelt's Dictation, (d) the contrast of Section 6 of the Raker Act with Section 6 of The Owens River Grant, and (e) the several Hetch Hetchy bills introduced by Representative Raker in the 63rd Congress, first session (1913).

Throughout the course of this action in the District Court, the Government maintained an interpretation of Section 6 in full harmony with the reading which we give the section after supplying the omitted words as upon an ellipsis. The Government's interpretation, in harmony with that of the Municipality, is found in the complaint, the Government's opening statement at the final hearing, the Government's position through the final hearing, the brief for the Government filed in the District Court on November 1, 1937, and the reply brief for the Government filed on February 26, 1938.

The District Court concurred in the interpretation which the Government put upon Section 6, i. e., that it was the purpose thereof and that it did prohibit sale for resale; and while it made mention of the belated argument of February 26, 1938 that the same section forbade a contract of agency, it made no comment upon the soundness thereof. The issue decided by the District Court

was whether the contract was one of sale for resale or one of agency.

In the two briefs filed by the Government in the Circuit Court of Appeals the Government maintained the same position, and the opinion of the Circuit Court of Appeals states the claims of the Government in line with the foregoing and its conclusions in respect thereto.

In its Petition for Certiorari, page 8 foot, the Government argued that "the 'selling' prohibited [by Section 6] is not the selling of energy for resale", a proposition which was never before advanced in the case and which is in diametrical opposition to the positions taken by the Government throughout the litigation and in both of the courts below.

In Brief for the United States filed March 8, 1940, the Government renews its argument thus made for the first time in the Petition for Certiorari and claims that the selling prohibited is not a selling of energy for resale except "by necessary implication". (p. 18 and ftn. 9.) The language of the Brief is not exactly the same as that of the Petition but the plain effect is identical.

The authorities which support the foregoing propositions will be found infra, pp. 54-56.

2. The Government not having applied for certiorari to review the holding of the Circuit Court of Appeals that the contract of July 1, 1925, is one of agency and not one of sale for resale, should not be permitted here to challenge that ruling.

For authorities upon this point, see infra, pp. 56-58.

3. If it should be held that the Government may now claim (a) that there are other sections of the Raker Act which control the case in whole or in part; (b) that it is not the purpose of Section 6 to and that it does not prohibit sale for resale; and (c) that the contract of July 1, 1925 is one of sale for resale, the considerations which follow show (so we submit) that there is not any validity in any of the propositions thus stated.

4. Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice, nevertheless, these are brought to the attention of the Court to make it known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that it may be shown how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof.

5. The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale, which fully appears without resort to Congressional debates or the interpretation put upon Section 6 in the Department of the Interior or by the Department of Justice in this action.

6. It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas.

There is no language in Section 6 which can be interpreted to deal with a contract of agency or to forbid the same. (See Opinion of Circuit Court of Appeals, R. 674; 106 F.2d 575, c. 1, lines 19-29; R. 676-677; 106 F2d 575, c. 2, line 49 to 576, c. 1, line 2.) The argument for this latitudinarian construction of Section 6 contended for by the Government is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals (a) that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; (b) that it does not "prohibit employment of an agent for transmission purposes"; (c) that "the Government has never contended to the contrary" of either proposition; and (d) that "there is nothing in the decree which requires that the City make distribution without an agent". (Govt. Supp.. Br. C.C.A. p. 8, quoted infra, p. 81); concessions seemingly repeated by implication in Petition for Certiorari, p. 7, footnote 5, last line, and in terms renewed in Brief for the United States, p. 12, quoted supra, p. 20.

7. In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function". (298 U.S. 237.) The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

8. The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of

the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them.

9. There is no merit in any other argument made in the Brief for the United States to overthrow the proposition (a) that it is the purpose of Section 6 to and that it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency.

10. The contract of July 1, 1925 is one of agency and not one of sale for resale.

11. The seven points, 1 to 7, inclusive, upon which the Government rests its argument that the contract of July 1, 1925 is one of sale and, therefore, unlawful will be found, upon analysis, to be wanting in merit and to afford no justification for even the unsound method of interpretation put forward in the brief.

12. The so-called findings of fact respecting the interpretation and meaning of the contract are not to be regarded as findings at all, considering (a) that questions respecting the construction of a contract are questions of law and not of fact, and (b) that the contract is plain and unambiguous and (as the Government conceded below) has been fully performed in all particulars, except one which arose ten years after the execution of the contract, and in respect of which the Government contends that the Company should in the years 1935, 1936 and 1937 have accounted to the Municipality for smaller sums than it actually accounted for in those years. Furthermore, there was no evidence extrinsic to the contract which in any manner varied the terms thereof, and hence any finding

in conflict with the plain terms and legal effect of the contract is unsupported by the evidence and should be rejected, quite apart from the fact that the case being one in equity, the findings are at large in this Court.

13. There is a clear and fundamental fallacy (so we submit) in the method which the brief employs in the interpretation of the contract to its destruction, by casting it, by construction, into a category which the Government argues makes it illegal whereas, if it were permitted to remain in the category in which the parties intended it to be, it would be effective and lawful.

14. There is no warrant for the suggestion that the contract of July 1, 1925 is opposed to the legislative policy of Congress, or that the congressional policy which underlies Section 6 is any broader than that expressed therein.

15. There is no merit in any other argument made in the Brief for the United States to establish the contention that the contract of July 1, 1925 is not a contract of agency, or (as expressed by the Government) that it is a contract constituting a grant, upon a consideration, of the right to sell.

16. Even if the contract of July 1, 1925 were in violation of Section 6 of the Raker Act, the Government would not be entitled to the relief which it here seeks.

17. The District Court erred in sundry instances in rejecting evidence offered by the Municipality.

ARGUMENT.

1. The Government having uninterruptedly maintained the position in the Courts below that the case is controlled by Section 6 of the Raker Act and the purpose thereof is to prohibit, and that it does in fact prohibit, sale for resale should not now be permitted in this Court to argue to contrary effect.

We submit that we have shown, in subdivisions (g), (h), (i) and (j), supra, pp. 12 to 25, that from the filing of the Complaint in this action April 27, 1937, to the filing of its last brief (after oral argument) in the Circuit Court of Appeals, July 10, 1939, the Government uninterruptedly maintained in the courts below that the case was controlled by Section 6 of the Raker Act and that the purpose thereof was to prohibit, and that it did in fact prohibit sale for resale.

We also submit that we have shown in subdivisions (k) and (l), supra, pp. 25 to 27, that in its Petition for Certiorari and in Brief for the United States the Government maintains a position in diametrical opposition to the position which it so maintained in the courts below.

Finally, we submit that the Government should not be heard to make arguments in support of this new position.

The case comes within an important and universally accepted rule of appellate procedure, which has been applied in this Court, in certiorari.

"This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it" (*Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380).

"Generally, at least, suitors may not maintain a position here which conflicts with that taken below" (*Seney v. Swift & Co.*, 260 U.S. 146, 149). "The point does not appear to have been raised either in the District Court or in the Court of Appeals. . . . We are not disposed to deal with a question of that importance presented in this manner" (*Kay v. United States*, 303 U.S. 1, 5). "[The new argument] is an afterthought and urged in this court for the first time" (*Virtue v. Creamery Package Co.*, 227 U.S. 8, 39).

In the following cases this rule was applied against the Government. *United States v. La Franca*, 282 U.S. 568, 576 ft.; *Kay v. United States*, 303 U.S. 1, 4 ft.; *United States v. Peterson* (CCA 10) 34 F.2d 245, 250, c. 1 top.

The rule just invoked is akin to the rule on "Invited Error".

"The District Court . . . granted the Government's motion . . . Of this error the Government cannot complain" (*Law v. United States*, 266 U.S. 494, 496). "The defendant . . . cannot complain of a course to which it assented below" (*Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U.S. 353, 356). "The defendant procured or acquiesced in the rulings . . . and thereby waived the right to object to them" (*New York Elevated Railroad Co. v. Fifth National Bank*, 135 U.S. 432, 441).

This rule was applied against the Government in *United States v. Kettenbach* (CCA 9), 208 Fed. 209.

A reference to innumerable cases, federal and state, which support these propositions will be found in the Encyclopedias and Textbooks assembled in the margin.[15]

The point with which we are now dealing is ignored in Brief for the United States although it was made in Add. Br. Opp. Cert. pp. 16, 67, and although note is taken of the latter brief in the former. (p. 17, fn. 8.)

2. The Government not having applied for certiorari to review the holding of the Circuit Court of Appeals that the contract of July 1, 1925, is one of agency and not one of sale for resale should not be permitted here to challenge that ruling.

In Add. Br. Opp. Cert. p. 14, we pointed out that in its Petition the Government did not seek certiorari to review its specification of error that the Circuit Court of Appeals erred "in failing to hold that the contract of July 1,

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[15]The following deal with the rule that an appellant (or petitioner in certiorari) will not be permitted to advance arguments on appeal not made below.

3 *C. J.*, *Appeal and Error*, Sec. 618, p. 718, and Supplements;
4 *C. J. S.*, *Appeal and Error*, Sec. 241, p. 465;
3 *Am. Jur.*, *Appeal and Error*, Sec. 253, p. 35;
6 *Cyc. of Fed. Proc.*, Sec. 2974, p. 585;
Simkins, Federal Practice, 3rd Ed., Sec. 1002, p. 720;
8 *Hughes Federal Practice, Jurisdiction and Procedure*, Sec. 5613, p. 147;
Elliott, Appellate Procedure, Secs. 489 et seq., pp. 410 et seq.

The following deal with the rule on Invited Error:

4 *C. J.*, *Appeal and Error*, Sec. 2606, p. 700 and Supplements;
5 *C. J. S.*, *Appeal and Error*, Sec. 1501, p. 173;
8 *Hughes, Federal Practice, Jurisdiction and Procedure*, Sec. 5613, p. 144;
Marker, Fed. App., Jurisdiction and Procedure, Sec. 218, p. 267;
Elliott, Appellate Procedure, Sec. 623 et seq., pp. 543 et seq.

1925 between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act". (Petition, p. 8, lines 3-6.) The Petition said that the specification "is not urged as a reason for granting the writ of certiorari, but is reserved for argument on the merits" (Petition, p. 8, footnote 6), and that "if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City". (Petition, p. 2 footnote 1.)

We call attention to the following decisions.

"Our consideration of the case will be limited to the questions specifically brought forward by the petition". (*General Pictures Co. v. Elecric Co.*, 304 U.S. 175, 177.) "The review granted was not intended to be broader than that sought in the petitions". (*Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494.) "It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner". (*Helis v. Ward*, ___ U.S. ___, 60 S. Ct. 283, 285 c, 1 Adv. Ops. October Term 1939, 240, 242, decided December 18, 1939.)

See also *Helvering v. Wood*, ___U.S.___, decided February 26, 1940, and *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508.

As the Government did not ask Certiorari in respect of the interpretation put upon the agreement of July 1, 1925 by the Circuit Court of Appeals, we submit that the mere statement of that question in the Petition as one which the Government would later bring forward does not de-

stroy the applicability of the rule stated in the cases mentioned.

Although this point was taken in Add. Br. Opp. Cert. pp. 14-15, and *Helis v. Ward*, supra, cited in support thereof, p. 76, the point is ignored in Brief for the United States.

3. If it should be held that the Government may now claim (a) that there are other sections of the Raker Act which control the case in whole or in part; (b) that it is not the purpose of Section 6 to and that it does not prohibit sale for resale; and (c) that the contract of July 1, 1925, is one of sale for resale, the considerations which follow show (so we submit) that there is not any validity in any of the propositions thus stated.

We propose now to show (a) that the purpose of Section 6 of the Raker Act was to prohibit and that it does prohibit sale for resale (and nothing more); (b) that Section 6 does not prohibit agency; and (c) that the contract of July 1, 1925 is a contract of agency and not one of sale for resale.

4. Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice, nevertheless, these are brought to the attention of the Court to make it known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that it may be shown how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof.

From the beginning the Government has steadfastly argued that Section 6 was a clear and unequivocal pro-

hibition against sale for resale. In its first brief filed in the District Court November 1, 1937, it said: "It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale. In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified." (p. 58.) (Quoted supra p. 5.)

We agree with the position of the Government thus stated in its first brief and we quote, infra, pp. 92 to 94, from decisions of this and other Courts to the effect that "as this Court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive". (*Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937).)

The absence of necessity or justification for resort to legislative history is equally applicable in respect of proceedings in the Department of the Interior. Indeed, the Brief for the United States, p. 17, fn. 8, says that "the statute is unambiguous". We agree that there is nothing ambiguous in the prohibitions of Section 6 and therefore resort to the interpretation thereof in Departments of the Government is neither necessary nor justified. The Government so conceded below, supra, p. 5.) Although we differ with the Government as to the meaning of the Section because we adhere to the view expressed by the Government November 1, 1937, supra, p. 5, whereas the Government has changed its position altogether and now says in effect that it is a clear and unequivocal prohibition

of something different. Resort to aid of interpretation from the Department of the Interior is, in our opinion, neither necessary nor justified; but if there were necessity or justification for such resort, the interpretation of the statute by the Department through the years would be followed. *United States v. Minnesota,* 270 U.S. 181, 205 foot (1926): "Even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction"; *Wisconsin v. Illinois,* 278 U.S. 367, 413 foot (1929): "Nothing is more convincing in interpretation of a doubtful or ambiguous statute"; *McLaren v. Fleischer,* 256 U.S. 477, 481 (1921): "If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons"; *Brewster v. Gage,* 280 U.S. 327, 336 foot (1930): "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons"; *Fawcus Machine Co. v. United States,* 282 U.S. 375, 378 foot (1931): "They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons."

Bearing these views in mind, we proceed to consider the interpretation which has consistently been put upon Section 6 by the different departments of the Government and to show that for twenty-four years (1913-1937) including the period during which the Raker Act was in course of enactment in Congress, there was unanimity in the interpretation of Section 6 as forbidding, in cases presenting the contentions here present, sale for resale and nothing more.

(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was had there. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a prohibition of sale for resale (and nothing more).

Discussion of Section 6 in the House.

The purpose of Section 6 was dealt with in the House on August 29, 30 and September 2, 1913, by Representative Towner of Iowa, Representative Thomson of Illinois, a member, and Representative Ferris of Oklahoma, Chairman, of the House Committee on the Public Lands. They said:

"It is proposed in this bill that the city can not sell water or power to any corporation or individual to sell or sublet. But it is not provided that the city may not sell to any corporation it chooses all the water or electric energy it desires for its own use." (Representative Towner, August 29, 1913, 50 Cong. Rec. Appendix, p. 462, c. 2.)

"Under the provisions of section 6 the grantee . . . can not sell water or electric energy to any private corporation or individual for the purpose of resale."

(Representative Thomson, August 30, 1913, 50 Cong. Rec. 3980, c. 1, top.)

"Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individual or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? . . . If this language is read carefully I think it will be seen that . . . these municipalities are prohibited from ever selling or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it." (Representative Thomson, August 30, 1913, 50 Cong. Rec. 3996, c. 2, top.)

"It says that the city can sell their water power to private individuals or corporations for consumption, but not for the purpose of resale." (Representative Thomson, September 2, 1913, 50 Cong. Rec. p. 4094, c. 2, middle.)

"When this bill was being considered by the committee I offered an amendment to Section 6, . . . by adding the words 'or electric energy'. With those words in that section . . . San Francisco may sell this water or electric energy . . . . to any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2, ft.-4097, c. 1, top.)

"[The] lessee . . . is by the terms of the bill confined to somebody who wants to use this for consumption. . . . What objection is [there] to the city of San Francisco selling electrical energy to somebody, either an individual or a corporation, solely for consumption and not for the purpose of reselling?" (Representative Thomson, September 2, 1913, 50 Cong. Rec. p. 4097, c. 1, ft.)

"San Francisco could not sell to any soap manufacturer or ice manufacturer anything that they could resell, but they could sell it to them for their own use." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 1, foot.)

"There is an express provision to the effect that they can not resell the power in any way. They can sell for use only with a positive restriction against sale for any resale purposes of any sort." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 2, middle.)

It is manifest that these members of the House who spoke respecting the meaning of Section 6 read the section as it is written and had no difficulty in understanding that the provision was intended to prohibit sale for resale (and nothing more).

We now consider how the section was dealt with in the Department of the Interior.

(b) Whenever it had occasion to consider Section 6 in the period 1913-1937 the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale (and nothing more).

The record shows that Section 6 came under review or was mentioned or referred to in the Department of the Interior on five different occasions and that there were three formal opinions by Solicitors of the Department and one by the Secretary dealing with the subject.

The first was by Solicitor Edwards, June 8, 1923 (R. 342-354); the second by Acting Solicitor Wright, July 20, 1925 (R. 234, last line; 359-366); the third by Solicitor Margold October 27, 1933 (54 I. D. 316; R. 243, line 14); and the fourth by Secretary Ickes August 24, 1935 (R. 232-269).

In each of these, the opinion was expressed in one form or another that Section 6 forbids sale for resale, without more.

Solicitor Edwards' opinion did not deal with the contract of July 1, 1925 for it was rendered in 1923 two years before the contract was made.

Acting Solicitor Wright, whose opinion was written nineteen days after the execution of the contract of July 1, 1925, held "that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute" (R. 234:31-235:8).

Solicitor Margold dealt with the meaning of Section 6 abstractly, and not specifically in reference to the contract. He held (in 1933) that "San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the mu-

nicipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed" (54 I. D. 316, 317).

He also said:

> "I wish particularly to emphasize the fact that this section prohibits . . . the transfer by the municipality . . . of any right to resell or sublet any electric energy *which it may sell to a private company.*"

Secretary Ickes held that Section 6 forbids a contract of sale for resale and that the contract of July 1, 1925 was such a contract of sale for resale and not one of agency and therefore was in violation of the Raker Act.

There is nothing to show when Acting Solicitor Wright's opinion was made public or came to the knowledge of the Municipality. So far as the Record shows it first became publicly known through reference thereto in Secretary Ickes' opinion of August 24, 1935 (U. S. Ex. 11, R. 230-269), where it is said (R. 234:31-235:8):

> "On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute."

Secretary Ickes' opinion was introduced in evidence by the Government. The Municipality offered the opinion of Acting Solicitor Wright. The Government objected. The opinion (for text thereof, see R. 359-366) was received in evidence subject to a motion to strike it out, and later, on motion of the Government, was stricken out. This was Assignment of Error No. 11 by the Municipality (R. 535), and is here for review.

Opinion of Solicitor Edwards: Circumstances Giving Rise Thereto.

The work of construction of the Hetch Hetchy project covered the period 1913-1925; in that period it became necessary for the Municipality to provide electric energy for construction work and by 1918 it had constructed (within the Stanislaus National Forest at a point shown on the Map at the end of this brief) and was operating in the High Sierras the Early Intake Power House, which is a relatively small one, presently furnishing only 3% (R. 291) of the entire electric energy generated by the Municipality.[16] The amount generated at Early Intake in 1918 exceeded construction requirements and there was a surplus either to waste or to be disposed of. This was during the World War. The Federal Power Administrator for California September 18, 1918 directed the Municipality to make arrangements to turn this power over to the Sierra and San Francisco Power Company so that it would be available for general use (R. 408-410), which was accordingly done. (Ost R. 407:11-408:6.) The Pacific Gas and Electric Company had no interest in the Sierra and San Francisco Company at that time, but later became lessee of its system, and later still, acquired its physical properties. (Vincent R. 290:28-291:11; Ost R. 428:9-16.)

This disposition of the Early Intake surplus power continued to 1923 by which time the sales thereof through a period of five years had totalled $200,000 (Solicitor

[16]The contract of July 1, 1925 deals only with energy generated at the Moccasin Power Plant, but the District Court found that "since late in 1935, the electric energy . . . [generated] at the City's Early Intake plant . . . has been and is now being delivered to the Company under the terms of the contract" of July 1, 1925 (R. 161).

Edwards' Opinion, June 8, 1923, R. 345 ft.; Secretary Ickes' Opinion, August 24, 1935, R. 261-262). On May 8, 1923, the National Park Service called the situation to the attention of the Secretary of the Interior (R. 234:1) and this fact gave rise to Solicitor Edwards' opinion of June 8, 1923 (R. 234, 242-254); which is mentioned in the opinion of Secretary Ickes, from which we quote infra, pp. 70-73. (See, also, Opinion of District Court, R. 94:23-95:14; 23 F. Supp. p. 43, c. 2, lines 26-46.)

Opinion of Solicitor Wright: Circumstances Giving Rise Thereto and Attendant Thereon.

The Ordinance of San Francisco authorizing the contract of July 1, 1925 was "passed for printing" (for that term, see R. 219) June 22, 1925, and was finally passed and approved by the Mayor June 29, 1925. (R. 90.) Thus the full text of the proposed contract was publicly known and available June 22, 1925.

Section 2 of that Ordinance provided (R. 89): "As soon as said agreement is duly executed by the parties therein named, a duly executed copy or certified copy thereof shall forthwith be presented to the Secretary of the Interior of the United States at Washington, D. C.".

Within the week June 22-29, 1925, Assistant City Attorney Dailey and Assistant City Engineer Eckart of San Francisco were in Washington conferring with Mr. Edwards, Assistant Secretary of the Interior (in the absence of Secretary Work) about the contract, and Mr. Dailey remained on the same errand to July 4, 1925. (R. 335:4-337:3.) In the meantime, the Ordinance was finally passed and approved by the Mayor, as already stated, June 29, 1925, and the contract was executed July 1, 1925, and would

therefore have been available (through air mail) in the hands of Mr. Dailey before he left Washington on July 4, 1925.

The District Court refused to receive the testimony of Mr. Dailey respecting the substance of his conversation with Mr. Edwards (R. 337:4; Ruling and Exception No. 9; R. 533; Assignment of Error No. 9, here for review), but it is clear that Mr. Edwards received from Mr. Dailey a copy of the contract because Mr. Dailey was pressing for an approval thereof by Secretary Work as one of agency and not one of sale for resale. A copy of the contract was delivered by Acting Secretary Edwards (or by Secretary Work) to Acting Solicitor Wright for an opinion on its validity, for the latter rendered to the Secretary his above mentioned opinion of July 20, 1925, which, however, so far as the record shows, never became public nor known to the Municipality until 1935.

The only purpose of the visit of these representatives of the Municipality to the Department of the Interior was to obtain its approval of the contract as one of agency and not one of sale. In other words, it (the Municipality) sought an authoritative ruling from the appropriate department of the Government that its effort to make an agency contract had been successful. There were no differences of opinion respecting the meaning of Section 6. The Government and the Municipality both fully understood that it prohibited sale for resale and nothing more. No one suggested that the section forbade a contract of agency. The only question therefore that was involved in

the situation was whether the contract of July 1, 1925 was one of agency or one of sale for resale.

Secretary Work having returned to Washington in late July or early August, 1925, the Mayor, and Chairman of the Finance Committee of the Board of Supervisors, of the Municipality went to Washington to procure the approval of the contract by Secretary Work as one of agency and not one of sale for resale. (Dailey, R. 337:19-338:8; 338:15-23; R. 339:12-340:7; 340:20-341:4; 354:23-355:10; 355:15-25.) In the meantime, following the rendition of Assistant Solicitor Wright's Opinion on July 20, 1925, and on a date not shown in the record, a copy of that Opinion was transmitted by the Secretary of the Interior to the Attorney General in order to obtain the latter's advice. (R. 235.) The Attorney General replied August 5, 1925, but the text of that reply is not in the record, although the conclusions reached therein are summarized in Secretary Ickes' Opinion. (R. 235.) Finally, on August 19, 1925, Secretary Work wrote the Mayor of San Francisco, then in Washington, telling him that the Act did not require his approval of the contract, and he would "await a reasonable time until performance shall have indicated whether or not the acts of the parties constitute such a violation of the law as will make action on his part proper". (See text of letter, R. 356-357.) No ruling upon the question, which after all was the question whether the contract was agency or sale, was ever made by Secretary Work. (All of these facts are stated in the Opinion of Secretary Ickes of August 24, 1935, pertinent quotations from which appear infra, pp. 70-73.)

Solicitor Margold's Opinion: Circumstances Giving Rise Thereto.

It is evident that an inquiry was addressed to the Secretary of the Interior in 1933 which called for an interpretation of the Raker Act and that Mr. Margold's Opinion of October 27, 1933 (54 I. D. 316) was given in consequence of the inquiry but without any direct reference to the contract of July 1, 1925. In Secretary Ickes' Opinion in 1935 (R. 243) reference is made thereto, but it is erroneously cited, without title, as appearing in 51 I. D. 316, whereas the citation should have been 54 I. D. 316.

Secretary Ickes' Opinion: Circumstances Giving Rise Thereto and Extracts Therefrom.

Secretary Ickes fixed a hearing respecting the validity of the contract of July 1, 1925 for May 6, 1935 (R. 227-229) and after that hearing rendered his opinion offered in evidence by the Government at the final hearing (R. 232).

This opinion of Secretary Ickes, August 24, 1935, brings out clearly his own ruling that Section 6 of the Raker Act prohibits sale for resale, and that he put the invalidity of the contract of July 1, 1925 on the ground that it involved sale for resale. In the course of his opinion, dealing with the interpretation of Section 6, he said:

Extracts from Secretary Ickes' Opinion.

"In an opinion dated June 8, 1923, the Solicitor [of the Department of the Interior, Mr. Edwards] determined that any sale of Hetch Hetchy power for the purpose of resale was prohibited by the Raker Act. . . . He suggested that an arrangement be made 'by which the grantee [the City and County of San Francisco] would have its power transmitted over the lines

of the concern [Pacific Gas and Electric Company] owning or controlling the existing distribution system'." (R. 234:11-23).

"Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. . . ." (R. 234:24-28).

"On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute." (R. 234:31-235:8).

"A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate.[17] In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Immediately after pointing out that the contract might be viewed (1) as Proper, (2) as improper, or (3) as proper because temporary, he stated, 'In the exercise of your discretion you may come to the conclusion that this last is the correct view'.[18]

[17]Evidently, the Attorney General felt that if he gave an opinion that the contract was one of agency he would be embarrassed if later called upon to carry on litigation on the basis that it was one of sale for resale.

[18]We understand the meaning of this last sentence to be that the Secretary of the Interior could decide that the contract was proper because temporary, without holding any view as to whether it was proper (generally) or improper.

After receiving that advice, Secretary Work on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time." (R. 235-236)

"The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act." (R. 242:14-18)

". . . San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers." (R. 243:9-13)

"An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated," etc. (R. 243:24-27)

"San Francisco was granted certain rights on federally owned lands, subject to various conditions, among them those contained in section 6 prohibiting sale for the purpose of resale of any electric power developed on the land." (R. 245:13-17)

"I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the purpose of resale and that this prohibition is legally valid." (R. 247:1-4)

More Extracts from Secretary Ickes' Opinion.

Thereupon Secretary Ickes proceeded to deal with the contract, and we quote his language in respect thereto as re-assertions of his conviction that Section 6 forbids sale for resale (and nothing more). The Secretary said:

> "In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute." (R. 248:20-22)
>
> "It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers." (R. 256:9-11)
>
> "It is my opinion that the provisions of section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale." (R. 267:31-268:4)

The foregoing extracts from Secretary Ickes' Opinion make it very clear that his position was (a) that Section 6 of the Raker Act is aimed at sales with the right of resale; and (b) that the contract of July 1, 1925 would have been valid had he found it to be a contract of agency, but inasmuch as he found it to be a contract of sale for purpose of resale, he held it to be in violation of the Raker Act.

Secretary Ickes' Correspondence With Board of Supervisors (S. F.) and the Attorney General 1937.

Later, Secretary Ickes had correspondence with the Board of Supervisors of San Francisco, followed by a letter wherein the Secretary requested the Attorney Gen-

eral to bring this action, of which we quote only so much as bears upon the point which we now have in hand.

Secretary to Board, March 11, 1937: ". . . I have already advised you of my determination that San Francisco is now and for many years past has been violating the provisions of section 6 of the Raker Act by selling Hetch Hetchy energy to the Pacific Gas and Electric Company for distribution to consumers [resale]. . . ." (R. 271:6-11)

Board to Secretary, March 30, 1937: ". . . This Board believes that the agency contract under which City is now acting is fully in accord with the Raker Act". (R. 273:14-17)

Secretary Ickes to the Attorney General, April 2, 1937: ". . . San Francisco was granted the right to construct the Hetch Hetchy Project. . . . Numerous conditions are placed on the grant, among them being one which prohibits the sale of power generated by the grantee on the project for the purpose of resale by the purchaser" etc. (R. 275:15-23)

This action was commenced April 27, 1937, twenty-five days from the last quoted letter of Secretary Ickes to the Attorney General.

Secretary Wilbur in 1930.

In 1930 Secretary Wilbur had discussions with representatives of the Municipality, principally due to delinquency in performance of conditions required by the Raker Act in respect of the construction of roads, trails,

etc. and the contract of July 1, 1925 was incidentally mentioned, but it was spoken of by the Secretary on the theory that it was one of sale for resale and hence in violation of the Raker Act because, so it was assumed on all hands, the act forbade sale for resale. (See Secretary Wilbur's letter of December 8, 1930, R. 322.) The discussion respecting delinquency in the construction of roads and trails was settled by the payment by the Municipality to the Government of $1,250,000 in annual installments of $250,000 each in the years 1932-1936, of which mention is made, supra, p. 31.

We submit that the foregoing shows beyond peradventure that whenever it had occasion to consider Section 6 in the period 1913-1937, the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale, and nothing more.

(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale (and nothing more) and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type. Moreover, through the hearings in the District Court and in the Circuit Court of Appeals the Government continued to maintain that Section 6 forbids sale for resale.

In Point 1 of Argument, supra, p. 54, we seek to maintain the propositions just stated in the caption to this point as the basis of a claim that the position of the Government in its Petition for Certiorari and in

the Brief for the United States was diametrically opposed to the position taken in the Courts below and that it should be denied the privilege of here arguing positions not taken below and diametrically opposed to the positions taken by it in the two Courts below.

We now desire to cite the same course of conduct as evidence from a Department of the Government that our construction of Section 6 is sound.

It is unnecessary to repeat the facts assembled in subdivisions (g), (h), (i) and (j), supra, pp. 12-25, and accordingly, we submit the proposition with which this point is entitled upon what is there shown.

CONCLUSION.

We therefore submit that the proceedings in Congress and the positions of the Department of the Interior and the positions of the Department of Justice in this action show that all of them have interpreted Section 6 as one forbidding sale for resale, without more.

We now pass to the consideration of the meaning of Section 6 considered textually and without reference to any view expressed thereon in Congress, or in the Department of the Interior, or by the Department of Justice.

5. The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale, which fully appears without resort to Congressional debates or the interpretation put upon Section 6 in the Department of the Interior or by the Department of Justice in this action.

This brings us to a consideration of the forty-nine words which make up Section 6. We emphasize the words be-

cause howsoever they may be construed they control the dominant questions in the case. We seek to determine what the words mean.

There is no occasion again to dwell upon the circumstance that Section 6 was copied from Section 6 of The Owens River Grant nor that the provision in The Owens River Grant came from a dictation of President Theodore Roosevelt, as we have already covered that ground, supra, pp. 7-12.

The language employed in the three instances clearly shows and the words employed in each case are implicit with recognition of the fact that each of the municipalities was to engage in the sale of water, all on a large scale and with lawful authority to do so.

Indeed, the Raker Act required San Francisco in given events to furnish electric energy for commercial uses and necessarily in large quantities. In each grant Congress was making provision in respect of sales by the municipality involved to a corporation or an individual and in respect of each sale was prohibiting "a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed." (Govt. Supp. Br. C. C. A., p. 7, lines 10-15, quoted supra, p. 6.)

The whole idea was that title of the Municipality to the water or electric energy should not pass to another (private corporation or individual) coupled with the right of that other to resell or sublet.

The language employed in Section 6 of the Raker Act is to be treated as that of President Theodore Roosevelt. In 1906, seven years before the Raker Act was passed, he

was expressing the idea that a sale or lease of water for irrigation purposes by Los Angeles should not carry a right to the buyer to resell or sublet. The President was not considering, so we think ourselves entitled to assume, any legalistic questions. It must be assumed that he was aware that a sale or lease of water without restrictions would afford the purchaser a right to resell or sublet. This he desired to prevent and he expressed the purpose in language different than would have attended a similar effort by an outstanding legislative draftsman of long professional and technical training. We submit however that the President expressed his purpose; that he made it clear that the prohibition was aimed at unrestricted sales and leases and that his words required that sales and leases should carry limitations against resale or subletting, if, when and as necessary.

The Owens River Grant involved the generation of electric energy but there was no provision in the bill against sale or subletting thereof for resale or subletting. This was undoubtedly due to the circumstances under which the prohibition was formulated. It all turned on the question of the disposition of water for irrigation purposes. This was the concrete problem presented to the President and no account was taken by him of electric energy nor of water except for irrigation purposes.

When the prohibition was amended for insertion in the Owens River bill (after the conference with the President) it was concluded that there should be a restriction against sale for resale of all water whether for irrigation or otherwise, and accordingly, the words "for irrigation purposes" were stricken.

The prohibition is akin to a covenant against assignment or subletting in a lease; and akin to a deed, with building and other restrictions qualifying and limiting the general words of a grant and the enjoyment of the grant.

The prohibition of Section 6 in the Raker Act of 1913 is to be interpreted as Section 6 of the Owens River Grant and the Dictation of President Theodore Roosevelt, both dating from 1906, would be interpreted.

The meaning of Section 6 of the Raker Act is clear if attention is riveted upon the concluding words of the provision which are ". . . the water or the electric energy sold . . . to it [any corporation] or him [any individual] by the said grantee", i.e., San Francisco. These words presuppose sales by the Municipality and forbid the Municipality in connection with certain of its sales to pass to the purchaser the right himself to sell.

If a sale were made "to any corporation or individual", the prohibition applied, but if the sale were to "a municipality or a municipal water district or irrigation district", the prohibition did not apply.

We submit that the last clause in Section 6, read with the other language therein with or without the addition of implied words, clearly shows that the purpose of the section was to forbid sale by the Municipality for resale by the purchaser in the instances to which the prohibition applied.

6. It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency or to forbid the same. (See Opinion of Circuit Court of Appeals, R. 674; 106 F. (2d) 575, c. 1, lines 19-29; R. 676-677; 106 F. (2d) 575, c. 2, line 49 to 576, c. 1, line 2.) The argument for this latitudinarian construction of Section 6 contended for by the Government is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals (a) that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; (b) that it does not "prohibit employment of an agent for transmission purposes"; (c) that "the Government has never contended to the contrary" of either proposition; and (d) that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C. C. A. p. 8, quoted infra, p. 81); concessions seemingly repeated by implication in Petition for Certiorari, p. 7, footnote 5, last line, and in terms renewed in Brief for the United States, p. 12, quoted supra, p. 20.

In the Circuit Court of Appeals the Government claimed that there were words in Section 6 which properly construed forbade a contract of agency. These words were "selling or letting" and "sold or given", particularly "letting" and "given".

The argument of the Government first advanced in the District Court four months after the final hearing in Reply Brief for Plaintiff (U. S.) February 26, 1938 (supra, p. 18) "that even an agency agreement might be beyond the limitations imposed by Section 6 of the Raker Act" was noted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9) but no comment upon the soundness thereof was made. The case in the District Court was decided upon the theory upon which the com-

plaint was brought, namely, that the contract of July 1, 1925 violated Section 6 of the Raker Act because it was a contract of sale for resale and that section forbade such sale for resale.

We shall later deal with the Government's contention that there is language in Section 6 which should be construed to be a prohibition of agency, but, in the meantime, we wish to call attention to the concessions of the Government made in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that "the Government has never contended to the contrary" of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C. C. A. p. 8).

The exact language used was this:

> "Contrary to the statement in the [Municipality's] Outline of Oral Argument (p. 17), the Government has never argued 'that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent' and there is nothing in the decree which requires that the City make distribution without an agent. . . . Solicitor Edwards recognized that it did not prohibit employment of an agent for transmission purposes (R. 353-355) and the Government has never contended to the contrary."

These concessions were adopted by implication in Petition for Certiorari, p. 7, fn. 5, last line. They were also reenforced with the following from Brief for the United

States, p. 12: "While the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City, it does contend" etc.

In considering these concessions it is to be remembered that the generation and consumption of electric energy are practically simultaneous. It cannot be said that one precedes the other by a moment of time. The ultimate consumer obtains the energy by throwing or turning on his switch or plugging his socket, or pressing his button, etc., which being connected with the generator in the power house, automatically causes the generation of the energy—the throwing or turning on of the switch or the plugging of the socket or the pressing of the button, etc., the generation of the energy in the power house and the transmission to the consumer being practically simultaneous, as already stated.

The Newark station of the Company where the Municipality delivers its electric energy is forty miles from San Francisco. (Vincent, R. 282:11.) Electricity travels with the velocity of light, i.e., at the rate of 186,000 miles per second, and hence the time involved between Newark and San Francisco is 1/4650ths of a second.

In *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), speaking of electric energy, this Court noted that "the generation and transmission are apparently simultaneous and both respond instantaneously to the turning of a consumer's switch". (p. 165, syl. 1.) These views are supported by Dr. Robert A. Millikan, the famous American

physicist, in testimony quoted in *South Carolina Power Co. v. South Carolina Tax Commission* (D. Ct. S.C., 1931), 52 F.2d 515, 523, c. 1, line 22, at p. 523, c. 1, line 45 to p. 524, c. 1, line 23), and are likewise the views of Sir Joseph John Thomson, F.R.S., the great British physicist. (See "Electricity" in The Encyclopedia Britannica, 14th Edition, Vol. 8, pp. 190, col. 1 and 304, col. 1.)

With these characteristics respecting the generation, transmission and consumption of electric energy, it is pertinent to ask the question which follows:

If the Municipality may employ the Company as "an agent for transmission purposes" (see Petition for Certiorari p. 7, footnote 5) or employ "the Company as a carrier for the transmission of power generated by the City" (Brief for the United States, p. 12). What meaning is to be ascribed to the limitation in Brief for the United States, p. 12, when it says "provided the sales are made by the City"?

The Company transmits the energy of the Municipality to the switch of the consumer and the Government concedes that that may be done lawfully. The Government says, however, that the agent "sells the water or energy"; but this is not true in a legal or in any other sense. The Municipality has employed a distributor who makes the energy available to the consumer when he throws his switch and a sale occurs through the offer of the energy by the Municipality and the taking in thereof by the consumer.

There is nothing in Section 6 which says an agent may transmit but he must not bill the consumer nor collect from him.

There is one practical test to which the whole argument of the Government might be put. Let us assume that the Municipality was distributing its own energy and that the Company was distributing its energy. Would the Raker Act prohibit the Municipality from employing a canvasser for business or an agent (corporate or individual) to sell its electric energy?

In challenging the power of the Municipality to sell its electric energy through the Company, as its agent, the Government would seemingly thereby disqualify the Municipality from selling at all, inasmuch as a corporation, including a municipal corporation, such as the District of Columbia, "can act only by its agents or servants". (*Barnes v. District of Columbia*, 91 U. S. (1 Otto) 540, 545 (1876). See, also, *Dearborn v. Grand Lodge*, 138 Cal. 658, 663 (1903); *Scott Stamp Co. v. Leake*, 9 Cal. App. 511, 516 (1908); *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 617, 31 Pac. 367 (1892); 6A *Cal. Jur.* "Corporations", § 13, p. 60; § 642, p. 1131; 43 *Corpus Juris* "Municipal Corporations", § 235, p. 236; § 1186, p. 707.)

Moreover, it is contrary to all ideas to forbid one to act through an agent. "He who acts through another acts by himself". 1 McKinney New Calif. Digest p. 3. "Qui facit per alium, facit per se". 51 *Corpus Juris* 294.

We reserve for consideration, infra, the argument in Brief for the United States, p. 22, that this is a legal fiction, and therefore, as we understand the Goverment, a municipality selling through an agent is not itself acting.

If it were proper to say that some agencies are not prohibited but other agencies are forbidden, it would be necessary to find words in Section 6 to carry this new idea; in fact, the idea partakes of both a negative and a positive character, for although, if no agency is prohibited, there is no need to mention agency at all, nevertheless it is clear that if some are prohibited and others are not prohibited, the fact must be shown by language in the section at once positive and negative. There is no such language.

Passing this phase of the question, we return to the words of Section 6 out of which the Government seeks to spell a prohibition against agency, and in that connection, it is to be noted that Section 6 is a prohibitory law and those things only are forbidden which are specified as prohibited. The prohibition is levelled against "selling or letting" alone; and nothing is forbidden which is not embraced within "selling or letting".

There is no prohibition against agency.

Section 6 merely prohibits the Municipality from "selling or letting". Therefore, there is no scope of language to sustain wider prohibition. Specifically there is nothing to justify the idea that agency is prohibited. The Circuit Court of Appeals so held. (R. 674, line 15; 676, line 25; 106 F.2d 575, c. 1, line 19; 575, c. 2, line 49, quoted supra, pp. 23, 24.)

In support of this ruling we call attention to the four groups of three words each in Section 6, which we indicate by underlining below:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The first group "selling or letting" furnishes the subject of the prohibition; "selling or letting" (something) is forbidden and that is all that is prohibited. "Selling or letting" does not need interpretation.

Letting is another way of saying leasing, which is doubly clear when we connect "letting" with the word "sublet" later appearing in the section. See opinion of Circuit Court of Appeals (R. 677, line 6; 106 F.2d 576, c. 1, line 5), where it is said:

> "The term 'letting' in Section 6 obviously means leasing. This is clear by the use of the word 'to' between the word 'letting' and the words 'any corporation' in the section."

The words "selling or letting" are to be tied to the words "sell or sublet". "Sell" is a second "selling"—it is resale; "sublet" is a second "letting".

The words "selling" and "letting" are plain and simple. They prohibit a "selling" with "the right to sell" [resell]. They forbid a "letting" with the right to "sublet". The prohibitions apply to water or energy "sold" [transfer of title for a consideration] or "given" [including say transfer of title involved in "letting"].

The plain meaning of the section is that whatever interest in water or electric energy is passed on by the

Municipality to a private corporation or individual shall be for the latter's personal use ("buyer's own consumption")[19] and not to be by "it or him" transferred anew.

The prohibition is against "selling", i.e., against a sale, and against "letting", i.e., against a lease. In a sale "one transfers to another an interest in property". In a lease "one transfers to another an interest in property", but it is usually a lesser interest than is imported by a "sale". This is all shown in the law of real property and the illustrations may be adapted to personal property.

Holt v. City of Montgomery, 212 Ala. 235, 102 So. 49 (1924): "A lease is a . . . grant of an estate in land"; *Waskey v. Chambers*, 224 U.S. 564, 565-566 (1912): "The right of a lessee is the same as that of a purchaser in fee".

The second group of three words in Section 6 above underlined are "sell or sublet". As we have just made clear, these words require no interpretation. In the context, "sell" refers to a second sale—a resale, and "sublet" to a second letting, i.e., leasing.

These words mean "[re]sell or sublet". Plainly, the word "sublet" means a second letting. The first letting is the one from the Municipality to X and the second letting, would be one from X to Y, if allowed. So likewise in re-

[19] *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U.S. 165 (1915) involved a contract of sale where the vendee "bought the goods exclusively for purchaser's own use."

Fosburgh v. California & Hawaiian Sugar Refining Co., (CCA 9, 1923) 291 Fed. 29 dealt with a contract by a sugar refining company to sell sugar to a candy company wherein it was provided that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."

spect of the word "sell". That is a second sale; the first sale being from the Municipality to A, and the second sale being from A to B if allowed.

(In connection with the foregoing we desire to make the point, that both of the clauses have to be taken into account in the interpretation of the section.)

The third group of words "sold or given" presents no difficulty. The word "sold", standing alone, could not give rise to discussion. This is equally true in respect of the word "given".

The word "given" first appeared in President Theodore Roosevelt's Dictation, where it was not associated with the words "sold or" but stood alone. The words "sold or given" appeared for the first time in Section 6 of The Owens River Grant.

The word "given", when used in the Dictation, clearly referred to the words "selling or letting" and meant as indicated by the supplied words which follow: "the water given [i.e., by way of sale or lease, as aforesaid] to it or him by the city" and referred to nothing else than the act of "selling or letting" which was the correlative of the word "given".

The word "given" does not enlarge the prohibition of "selling or letting"; it merely identifies "the water or the electric energy".

Striking proofs that the words "sold or given" are words to identify "the water or the electric energy" arise from the statement of the Government that "The right to sell, granting of which is prohibited by section 6, is the right to sell the Hetch Hetchy water or energy

obtained from the City" (Govt. Supp. Br. C.C.A. p. 4, lines 3-7, quoted supra, p. 5); and that "the breach occurs not in the sale, but in transferring with it the right to sell". (Govt. Supp. Br. C.C.A. p. 9, lines 11-13, quoted supra p. 6.)

The addition of the words "sold or" in Section 6 of The Owens River Grant did not alter the meaning of "given" as it stood in the Dictation; and in that dictation the word "given" referred to both "selling" and "letting", but inasmuch as the word "sold" was by later amendment specifically added, the effective function of the word "given" thenceforth was to be the correlative of "letting". Of course, when the word "given" stood alone in the Dictation, it had as correlatives both "selling" and "letting", but the draftsman of Section 6 of The Owens River Grant, to make assurance doubly sure, added the words "sold or", thus giving us "sold or given". If the word "given" in this connection had no historical background and its meaning were doubtful, interpretation would attribute to it a definition akin or having relation to the word "sold", say, as involving, transfer of title. The maxim of *Noscitur A Sociis* (46 Corpus Juris 496) would apply ("The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it")—a maxim akin to *Ejusdem Generis*. (19 Corpus Juris 1255.)

The word "give" has many meanings, but when it is read in the environment in which we find it here, it deals with transfer of title.[20]

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[20] "The word 'grant' is synonymous with 'give'. (Webster's Dictionary)". *Gurnsey v. Northern California Etc. Co.*, 7 Cal.

The fourth group: Next, there can be no dispute about what is meant by the words "it or him" which constitute the fourth and last group of three words each underlined above. They refer and are to be tied to "any corporation or individual", so that they should be read—"it [any corporation] or him [any individual]."

With these four groups of three words each shown to be of clear and unmistakable import, and none of them giving rise to any prohibition of agency, nothing remains

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App. 534, 544 foot (1908). "Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept'." *Standard Oil Co. of Indiana v. United States* (C. C. A. 7, 1908), 164 F. 376, 390 foot; *United States v. Bunch* (D. Ct. Ark. 1908) 165 F. 736, 739 foot. "The word 'given' as used in statute modifying the rule in Shelley's case [such as Section 779, C. C. Cal.] means conveyed." (Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738, syl. (1919).)

"The word 'give' is as expressive of a transfer of title as the word 'sell'" (In re Sonlard's Estate, 141 Mo. 642, 43 S. W. 617, 622, c. 2, ls. 49-51 (1897)), and while in proper context, it would mean a transfer of title without consideration, it does not exclude a transfer of title upon consideration. Latimer v. Bruce, 151 Ga. 305, 106 S. E. 263 (1921) held that an answer alleged "a contract upon a valid consideration" although the promise alleged was that "he would give her the property". The opinion says that "the word 'give' as employed in the answer, when considered in connection with the context, does not denote a technical gift" (p. 263, c. 2 middle). In times past words of conveyancing were "to give, grant and confirm" land to A. If the consideration was money, the deed operated as a bargain and sale, and if not for money, it was good as a covenant to stand seised. Harrison v. Austin, 3 Mod. 237, 87 Reprint 154 (1793); Cheney's Lessee v. Watkins, 1 Harris & Johnson 527, 2 Am. Dec. 530 (1804); Young v. Ringo, 17 Ky. (1 T. B. Mon.) 30 (1824); Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406 (1871). In Carter v. Alexander, 71 Mo. 585 (1880) it was held that the word "give" in a contract so far as it was related to land should be taken in the sense of "convey".

Evenson v. Webster, 3 So. Dak. 382, 53 N. W. 747 (1892) held that the instrument under review was a grant, although the word used was "give".

upon which the Government can base a claim that Section 6 did anything more than to prohibit sale for resale.

There are prohibitions in Section 6; the prohibitions go as far as they go and no farther; they forbid sale for resale; plain words are used and no interpretation of those words is needed. "The restraint upon alienation must not be exaggerated" as said in *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907), where it was held that a prohibition against sale of tribal lands by Indians did not forbid the cutting of timber for sale and the sale thereof.

In the foregoing we have not dwelt as much as we might upon the words "letting" and "sublet". Clearly, when there is a prohibition of "letting" "the right to sublet" a transfer of property capable of being leased and sublet is involved and the prohibition clearly forbids one to let property with the right in the lessee to sublet. Seemingly, nothing could be plainer.

7. In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function". (298 U.S. 237.) The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

Cutten v. Wallace (CCA 7, 1935) 80 F.2d 140, 143 footnote, assembles numerous cases to the point that "where there is no ambiguity in words of statute, there is no room for statutory construction".

In *Wallace v. Cutten*, 298 U.S. 229 (1936) Mr. Justice Brandeis, affirming the judgment in the last case cited and speaking for a unanimous Court, said (pp. 236-237):

> "The Government argues that . . . . the literal construction thus given [in the court below] to §6(b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act. . . .
>
> It would be inappropriate for us to discuss these, and other, arguments presented. The language of §6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said [by us in another case] . . . . 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'"

In *Seaboard Acceptance Corporation v. Shay*, 214 Cal. 361 (1931), the Court said (p. 365):

> "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used. . . . It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the legislature must be determined from the language of the statute."

The following are to like effect.

> "The intention of the Congress is to be sought for primarily in the language used, and where this ex-

presses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." (*Thompson v. United States*, 246 U.S. 547, 551 (1918).)

". . . in support of his contention, petitioner invokes history of the legislation, but that is not here permissible for the language and meaning of the statute in respect of the question under consideration are clear." (*Wilbur v. United States*, 284 U.S. 231, 237 (1931).)

"We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." (*Helvering v. City Bank Co.*, 296 U.S. 85, 89 (1935).)

". . . as this court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive." (*Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937).)

"The terms of the act are free from ambiguity, and in such cases the courts are not at liberty to resort to or examine the proceedings in Congress." (*Jeu Jo Wan v. Nagle* (CCA 9, Opinion by Rudkin, C.J. 1925) 9 F.(2d) 309, 310, c. 1 top.)

"The applicable provisions . . . are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the act is unambiguous and its meaning plain, is to be gathered from the act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this act speaks for itself; it does not call for construction." (*Commissioner of Internal Revenue v. Adams* (CCA 1, 1931), 54 F.(2d) 228, 229, c. 2 foot.)

"There seemingly is no canon of statutory construction better settled than the one which forbids reference to Congressional Records or to statements of legislators except in cases where the language of the statute is doubtful, uncertain or ambiguous." (*United Electric Coal Companies v. Rice* (CCA 7, 1935, cert. denied 297 U.S. 714), 80 F.(2d) 1, 8, c. 2 foot.)

"The legislative intent must be gathered from the plain meaning of the words used in a statute." (Syl, *Dart Drug Co. v. United States* (5 CCA, 1938), 99 F.(2d) 757.)

Upon the foregoing authorities, we submit that in claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function" (298 U.S. 237).

8. The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

United States v. Chase, 135 U.S. 255, 261 (1890).

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Hadden v. Barney, 72 U. S. (5 Wall.) 107 (1866).

"I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

Lord Tenterden, C. J. in *Brandling v. Barrington*, 6 B. & C. 467, 108 Eng. Rep. 523, 527 (1827).

"I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14."

Holroyd, J., *same case* (p. 527).

"The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act."

Crawford v. Spooner (1846), VI Moore P. C. 13 Eng. Rep. 582, 585.

See, also:

Estate of Barnett, 97 Cal. App. 138, 142 (1929);
M'Cowan v. Baine [1891] App. Cas. 401, 409;
Tompkins v. First Nat. Bank, 18 N.Y.S. 234, 235 (1892).

9. There is no merit in any other argument made in the Brief for the United States to overthrow the proposition (a) that it is the purpose of Section 6 to and that it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency.

In considering the arguments in the Brief for the United States (filed here March 8, 1940) in respect of the interpretation of Section 6, it is necessary to have at hand the theories of the parties respecting Section 6 from beginning to end in the Courts below. Hence, with some repetition, we state them in a summary way.

(a) From the beginning until after the final hearing in the District Court, the Government's theory of the case was (a) that Section 6 forbade sale for resale (without more); and (b) that the contract of July 1, 1925 was invalid because it was a contract of sale for resale.[21] The Municipality agreed that Section 6 forbade sale for resale, but denied that the contract was one of sale for resale, and claimed it was one of agency. At the final hearing, the sole question (disregarding defenses overruled by the District Court[22] and not dealt with in the Circuit Court of Appeals) was whether the contract was one of sale for resale or of agency.

[21] See supra, pp. 12-20.
[22] See footnote 12, supra, p. 28.

Four months after the final hearing and in its closing brief, the Government made its new contention that Section 6 also forbade a contract of agency and that therefore the contract was invalid even if a contract of agency, but it added this new contention to the one which it had theretofore made and did not abandon the earlier.

The District Court held that Section 6 forbade sale for resale and that the contract was one of sale for resale,[22] and entered its decree for the United States. It mentioned the argument of the Government that the section also forbade a contract of agency but it did not enter upon a consideration of the point. (R. 120 ft., 23 F. Supp. p. 52, col. 1, lines 6-9.)

Upon appeal, the Government and the Municipality agreed that Section 6 forbade sale for resale. The Government contended that it also forbade a contract of agency, which the Municipality denied. The Municipality reasserted its position taken in the District Court that the contract was one of agency and did not violate Section 6 inasmuch as the section did not prohibit a contract of agency.

The position of the United States in the Circuit Court of Appeals was "that the terms of Section 6 prohibit not

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[22] We are constantly considering whether the contract of July 1, 1925 is one of sale for resale. Had the contract been a contract of sale, it would have been one of sale for resale because obviously the Company was not receiving the energy at Newark for its own consumption. Therefore, if the contract were held to be one of sale, it would follow that it was one of sale for resale.

only a sale for resale but the creation of an agency by the City" etc. (Opinion CCA, supra, p. 25, line 6.)

The Circuit Court of Appeals accepted the argument of the Government "that the terms of Section 6 prohibit . . . sale for resale" but decided against its contention "that the terms of Section 6 prohibit . . . the creation of an agency by the City" etc. (Opinion, supra, p. 25, line 6.) The Court also decided against the Government's contention that the contract is one of sale for resale and held it to be one of agency. Thus the Circuit Court of Appeals reversed the decree of the District Court.

In the Petition for Certiorari it was argued that Section 6 does not forbid sale for resale; that the terms of the section do not deal with sale for resale; and that "the 'selling' prohibited is not the selling of energy for resale but the selling of the right to sell energy." (Petition, p. 8.)

In Brief for the United States (p. 18) it is argued that "The 'selling' expressly prohibited is not the selling of energy, but the selling of the right to sell energy. The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased."

The Government thus argues (and did so for the first time in the Petition for Certiorari) that Section 6 does not prohibit the selling of the commodity (i.e. water or electric energy) for resale, but that the prohibition is against selling the right to sell energy, and that only by implication does the prohibition against selling the right prohibit the selling of the commodity for resale.

(b) The Government has been driven to far fetched expedients to sustain the new theory respecting Section 6 put forward in Petition for Certiorari and in Brief for the United States.

In the first place, it practically throws overboard the idea of "selling" the right to sell and adopts a phrase better suited to its fallacies, i.e., "granting the right to sell". This departure involved a new requirement expressed in the words "for a consideration", making the phrase "grants for a consideration, the right to sell".

The motive which prompts the use of the words "for a consideration" is obvious. The Government found itself confronted with "selling . . . the right to sell" and did not feel that "granting" was an adequate substitute unless the words "for a consideration" were added because, with such an addition, the Government felt satisfied it could say "a grant" "for a consideration" is a "sale" and therefore would meet the requirement of the word "selling" in Section 6.

The Government also uses the word "endowing" in place of the word "granting", presumably on the theory that "endowing" better harmonizes with its argument for "a grant" from a principal to an agent.

The Brief speaks of "granting", "vesting", "endowing", "transferring", "disposing of" or "controlling" the "right to sell" twenty-two different times, at the pages and lines listed below;[24] and of the investiture of

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[24] 2:21-22; 2:25-26; 3:15; 3:19-20; 9:9-10; 9:22-23; 9:27; 10:7-8; 10:19-20; 12:19-20; 13:5-6; 13:14; 17:15-16; 18:24,25; 19:10-11; 19:15-16; 19:28-29; 20:9-10; 20:25-26; 20:27; 34:15-16; 35:2.

the right to sell "for a consideration" eleven times,[25] but speaks of "selling" or "sale" of the right to sell, disregarding quotations of Section 6, only seven times.[26]

(c) Although Section 6 speaks of "'letting' . . . the right to . . . sublet" this phrase of Section 6 is not dwelt upon in Brief for the United States; and this phrase (except where it occurs in quotations from Section 6) is not mentioned in the Brief save in the sentence printed in the footnote.[27]

The Government wisely abstained from testing its argument by applying it to "letting . . . the right to . . . sublet". The moment the word "sublet" is dwelt upon the whole purpose of the section is luminous because it presupposes a lease to A, say, of water or energy which he is denied the right to sublet. If instead of "sell or sublet" the words had been "resell or sublet" the argument in the Brief would never have been made (so we must assume), and yet, when we have the word "sublet", we are compelled to say that "sell" means "resell" (See Ellipsis, fourth version, supra, page 4, and readings of Section 6 and its prototypes distributively, supra, pages 9-11).

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[25] 9:22; 10:7-8; 10:19; 12:18; 13:6; 19:10; 19:16; 20:9; 20:13; 20:22-23; 34:15-16.

[26] 10:14; 13:11; 17:9-10; 18:10; 19:5-6; 21:1-2; 21:8. The words appear in quotations of Section 6 as follows: 2:7-9; 4:24-27; 9:19-20; 12:9-10; 14:5-6; 14:29-30; 18:5-7.

[27] "The district court . . . entered a decree enjoining the City from disposing of energy . . . in any . . . manner whereby the right to sell or sublet such energy is vested in any individual . . ." (Br. 3:14-20.)

(d) In thus ringing the changes on and repeating the words "grant" or "granting", the Brief does not mention the fact (which it might have done) that **neither the word "grant" nor the word "granting" is contained in Section 6.**

The word which the Brief should have used on the twenty-two occasions above mentioned was either the word "sell" or "selling". In other words, it should have spoken of "selling to the Company the right to sell energy", but seemingly, so we assume, the argument would lose caste if the Brief had used the word "sell" or "selling" in the place of "grant" or "granting" on these numerous occasions, and, so, it took the course frequently employed in hard driven arguments, i.e., to omit the true word and substitute a false one.

(e) The word "selling" in Section 6 contemplates a transfer of title. "It is fundamental that to constitute a sale there must be a transfer of title" (Opinion of Acting Solicitor Wright, July 20, 1925, R. 366, lines 1-3). The Municipality says the section refers to "selling" a commodity. The Brief argues that "selling" refers to "a right to sell". It would seem to follow that in such a case there would be a transfer of the right to sell. Selling and the transfer of title to the thing sold are inseparable. If there is a selling of a right to sell, a transfer of the right to sell is implied. Therefore, if the circumstances show that a transfer of the right to sell is not intended but a mere authority then there is no grant of the right to sell and the whole argument falls to the ground. If the "grantor" only authorized the Company to sell upon behalf of the grantor there would be

only an agency and neither "transfer" nor "grant" of the right to sell; and the use of the word "grant" would be inapposite to the last degree.

All this turns on what is sold: is it energy or "the right to sell energy"? If energy is sold, of course the title thereto passes, and if the right to sell is the thing sold, title to the right to sell is transferred, which is inconsistent with any idea of agency whereunder the agent is merely endowed with authority.

(f) In its Petition for Certiorari, the Government might have renewed its argument made in the Circuit Court of Appeals "that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City" etc. (Opinion, supra, p. 25, line 6), but there was a reason and an important reason why it did not do so; why it executed a volte face. The reason was that if Section 6 forbade sale for resale, that fact accounted for all of the words in the prohibition and there were no other words which it could seize upon to justify or to give countenance to the argument that the prohibition also covered a contract of agency. In other words, the Government recognizes that it can not maintain that Section 6 prohibits agency if it concedes that it forbids sale for resale, because, as we pointed out below and do so again here (supra, point 6, page 80), the prohibition of sale for resale exhausts the content of the section, both of words and ideas. Therefore, in the Petition for Certiorari (p. 8 foot), the Government declared that "the 'selling' prohibited is not the selling of energy for resale" (supra, subd. (k), p. 25); and in Brief for the United States it says (p. 18, ftn. 9) "The 'selling' expressly prohibited is

not the selling of energy, but the selling of the right to sell energy. The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased."

(g) In the Specifications of Error, Brief for the United States, p. 9, the misuse of language by the Government is to be noted. It is said that the Circuit Court of Appeals held that Section 6 "does not prohibit the granting to private corporations of the right to sell electric energy originating at Hetch Hetchy as agent for the City". The Court did not couch its conclusions in any such language nor in language which justifies description thereof by the language quoted. The Court held that a contract of agency is not forbidden by Section 6 and said nothing about "the granting . . . of the right to sell . . . as agent for the City" as shown in the Brief where it is said that "The circuit court of appeals, only two judges participating, reversed, with instructions that the complaint be dismissed (R. 678). It held that the contract is one of agency rather than sale and that the Act does not prohibit the sale of energy by the Company as agent for the City (R. 661-677)." (Brief, p. 3.)

(h) The Brief stresses the word "given" found in Section 6 with the words "sold or". We have fully covered the history, meaning and significance of the word "given" and shown that from the Dictation of President Theodore Roosevelt thenceforward, its purpose was to identify the commodity, first, water alone, and afterwards, water and electric energy, either sold or leased by the Municipality (supra, pp. 88-89 and fn. 20) and, further,

that, in the Dictation, the term "given" was used in a comprehensive sense, to cover both "selling" and "letting" (i.e. leasing).

(i) The Brief argues that Section 6 forbids any disposition of water or electric energy except through sales "by the City directly to consumers". (p. 16 ft.)

There is no support for these declarations in the text of Section 6 nor in any other provision of the statute; and we note that the Government does not claim that there is any provision of the statute dealing with the subject except Section 6. Furthermore this argument overlooks the fact that the language of Section 6 came to be employed in a comparable situation seven years before. (1906-1913.)

(j) The statement quoted from Solicitor Edwards' opinion (Brief, p. 8, ftn. 4) "that the Act clearly contemplates public ownership, sale and distribution" (R. 346) is misleading for the want of the words with which the quoted words were connected, which are "and not merely the development of water and power for sale to private concerns for resale and distribution. The legislative history of this law amply supports this interpretation of the language employed in the Act". (R. 346 foot 347 top.)

(k) The Brief does not deal with the suggestion made by judges of the Circuit Court of Appeals at the oral argument May 19, 1939 that it might be held that the prohibition of Section 6 was not concerned with a sale of water or electric energy but prohibited "selling" ("leasing" not mentioned) a franchise to sell ("sublet" not

mentioned) (Opinion, R. 674-675, 106 F. (2d) 575, c. 1, pars. 12-13.)

If this suggestion had prevailed, a reversal of the District Court would have resulted with, we submit, dismissal of action "even if the contract of July 1, 1925 constituted a sale of electric energy to the Company to be resold by it to the inhabitants of the City" (Opinion, R. 675 foot, 106 F. (2d) 575, c. 2, lines 10-18) inasmuch as the City had not granted the Company any franchise to sell. Counsel for the City were of the opinion that the suggested interpretation of Section 6 was not the true one and would not endure and therefore dissented therefrom. The Government likewise dissented. Leave was given to the parties to file briefs following the oral argument which they did. In the briefs each of them insisted that it was the purpose of Section 6 to and that it did prohibit sale for resale. See quotations from Govt. Supp. Br. CCA July 10, 1939, supra, pp. 5-6, and Opinion CCA, pp. 24-25, supra, pp. 5-6.)

(In the briefs filed before the oral argument, the parties were in agreement that Section 6 forbade sale for resale, without more, and therefore the attention of the judges was not called to the genesis of Section 6 nor to the circumstance that it originated in the letter of President Theodore Roosevelt of June 25, 1906, nor that it had been copied from Section 6 of The Owens River Grant, which was done in the briefs filed after oral argument. Moreover, there was not extended discussion of Section 6 as forbidding sale for resale because the parties were agreed that it was the purpose of the section to and that it did forbid sale for resale.)

The judges had in mind Article XIV, Section 1 of the California Constitution of 1879, which provides that "The use of all water . . . is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law" etc. (The section does not mention electric energy.) The text of Article XIV, Section 1, will be found in the Appendix hereto, page xxxii.

They also had in mind the provisions of Article XI, Sec. 19 of the California Constitution as adopted in 1879, and amended fundamentally in 1911, which were under review in *Russell v. Sebastian*, 233 U.S. 195, and the text whereof appears in Appendix hereto, page xxxiii.

The interpretation of Section 6 suggested by the judges would destroy all effectiveness for Section 6 as a few facts below will show.

In the period 1918-1923, as has already appeared, supra, pages 66, 67, the Municipality sold electric energy from the Early Intake plant to the Sierra and San Francisco Power Company, all within Tuolumne County, California. If Section 6 did not at the time prohibit sale for resale, then the Company became possessed of an unqualified title to the energy sold, and lawfully distributed it outside of San Francisco without any franchise or license from San Francisco; indeed, San Francisco did not have any authority to sell, grant or otherwise confer a franchise on the Sierra and San Francisco Company for operation, distribution, etc., in Tuolumne County.

Moreover, as the Municipality has Hetch Hetchy water and electric energy which it may sell at points along its lines which cross Tuolumne, Mariposa, Stanislaus, San Joaquin and Alameda Counties, California, buyers in those counties and for distribution there would not need any franchise denominated as a "right to sell" emanating from San Francisco and unless the sale of the water or electric energy was restricted so as to forbid the buyer to resell, Section 6 would have no operative effect in the suggested cases.

Again, when the Raker Act was passed in 1913, the Spring Valley Water Company had the constitutional franchise provided in Article XI, Section 19 of the California Constitution of 1879 to distribute water in San Francisco (*Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318 (1915)) which was in perpetuity and could neither be revoked nor impaired by any legislation, constitutional or statutory (*Russell v. Sebastian*, 233 U.S. 195 (1914)); and the Pacific Gas and Electric Company and the Great Western Power Company had franchises under the same constitutional provision to distribute electric energy in San Francisco. See Appendix hereto, page xxxiii, for the text of these constitutional provisions.

It is fair to assume that Congress was alive to the fact that the Spring Valley Water Company had a franchise and that therefore the section would be nugatory if it were merely a prohibition against the granting of a franchise. (The Spring Valley Water Company was mentioned on a number of occasions in the debates which resulted in the Raker Act and it is spoken of in H. Rept. No.

41, 63d C. 1st s. p. 17, from which we quote supra p. 43.)

If following the approval of the Raker Act and water being available, the Municipality had sold all the water to the Spring Valley Water Company and the Spring Valley Water Company had distributed it with its own water, under its own constitutional franchise, could there have been any complaint (if we indulge in the assumption that Section 6 deals only with the grant of franchises)? Clearly not, for, in the events suggested, the City would have sold the water to the Water Company and the Water Company, as owner, would have made distribution under its own constitutional franchise. (In later years the plant of the Spring Valley Water Company was acquired by the Municipality and the distribution of water has been wholly municipal since March 3, 1930.)

Take the present situation: If the contract of July 1, 1925 were treated as a sale, there would be no objection to it as one forbidden by Section 6, if we assume that the section deals only with the grant of franchises. The City does not purport in the contract of July 1, 1925 to confer a franchise on the Pacific Gas and Electric Company; it acted on the basis that the Company had authority to distribute.

It follows, then, that the interpretation of the prohibition of Section 6 as one merely against the granting of a franchise would strip Section 6 of all effective functioning.

(l) Finally, it is clear that no plain and common sense interpretation of Section 6 could ever lead to the contentions made in the Brief for the United States and quoted above; and that these contentions do not overthrow or impair the propositions advanced, supra, i.e., in Points 5 and 6, pages 76, 80, respectively, that it is the purpose of Section 6 to and that it does prohibit sale for resale and that it does not prohibit a contract of agency.

We add there are no remaining arguments in the Brief respecting the interpretation of Section 6, which call for reversal of the decree of the Circuit Court of Appeals.

10. The contract of July 1, 1925 is one of agency and not one of sale for resale.

"On July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy generated at the Moccasin power plant of the Hetch Hetchy project. In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof." (Opinion, C.C.A., R. 665 ft.; 106 F.2d 572, c. 1 ft.)

"The intention of the parties as expressed in the contract of July 1, 1925, was to create an agency agreement. It was the deliberate purpose of the parties to avoid making a sale and to avoid a transaction which could be construed as a sale of electric energy by the City to the Company. The contract was drawn with that purpose and intent. It is conceded that the terminology used in the contract is that appropriate to an agency and not to a sale." (Opinion, C.C.A., R. 667 ft.; 106 F.2d 573, c. 1 tp.)

(a) The intention of the parties to make a contract of agency is clearly and unequivocally manifested by the terms of the contract.

The parties to the contract of July 1, 1925 are a Municipality and a utility corporation of California; the contract was made and was to be performed in California. In these circumstances, its interpretation, so we submit, should be controlled by the title on "Interpretation of Contracts" in the Civil Code of California, nine pertinent sections of which are quoted in the Appendix hereto, pp. xvi-xvii. These nine sections are part of the title, comprising twenty-seven sections, i.e., 1635 to 1661, inclusive, which were copied (in 1873) from David Dudley Field's (proposed) New York Civil Code (1865) and may be taken to be rules of interpretation of universal acceptance. It is therefore unimportant whether we quote the rules of interpretation from the statutory law of California or from other authorities of universal acceptance.

"The agreement is just what the parties intended to make it" and "if that intention is clearly and unequivocally manifested, *cadit quaestio*" (Benjamin on Sales, 1st Am. ed. 1875, Section 309), varied in *Hatch v. Oil Co.*, 100 U.S. (10 Otto) 124, 131, lines 15-18, 1879) to say, "The agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances".

In its opinion, the District Court said that "the contract of July 1, 1925 was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act . . . [and it] became operative, with the parties to it hoping that the arrangement heeded the

admonition against resale of electricity which was set forth in section 6 of the act".[28]

In its opinion, the Circuit Court of Appeals said:[29]

> "The intention of the parties as expressed in the contract of July 1, 1925, was to create an agency agreement. It was the deliberate purpose of the parties to avoid making a sale and to avoid a transaction which could be construed as a sale of electric energy by the City to the Company. The contract was drawn with that purpose and intent."

It is to be noted that the contract is in writing and there can therefore be no dispute about its terms; that there has been no dispute about the meaning and effect of the contract between the parties thereto or between persons claiming under them; that each of the parties understood the contract in the sense in which the other understood it; and that the attempt to construe the contract contrary to what the parties intended is by a third person (the Government).

The determination whether the contract is one of sale or one of agency must start with the question whether it was intended that the Municipality should transfer title to the electric energy to the Company and that the Company should transfer title, as owner, to the consumer, or whether it was intended that the title to the energy should pass directly from the Municipality to the consumer through the instrumentalities of the Company acting as agent of the Municipality. It is to be noted that the con-

[28]R. 95, line 19 to 97, line 5; 23 F. Supp. p. 44, c. 1, line 1 to p. 44, c. 1, line 45.

[29]R. 667, line 26 to 668, line 1; 106 F. 2d 573, c. 1, lines 1-9.

tract uses the word "sold" only twice, i.e., "and meter the energy sold" [to consumers] at the end of paragraph First of the contract (R. 81:11-12) and "sold to consumers" at the end of paragraph Second. (R. 82:4.)

There is no warrant for the claim that the parties intended that there should be a transfer of title to the electric energy from the Municipality to the Company; and the contract is no clearer upon this point than it would have been had there been introduced therein express provisions that (1) The title of the electric energy of the Municipality is not to be transferred by it to the Company; and (2) each sale of electric energy shall be a sale by the Municipality to the consumer and never a sale by the Company to a consumer.

(b) In drafting the agreement the parties were alive to the provisions of Section 6 of the Raker Act and intended to make the contract one of agency which they believed would be valid under the Raker Act, and not one of sale forbidden thereby.

"In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof." (Opinion of Circuit Court of Appeals.)[30]

The decision of the Supreme Court of California in *Los Angeles Gas & Electric Corporation v. City of Los Angeles*, 188 Cal. 307, 205 Pac. 125, was rendered February 25, 1922, more than three years before the execution of the contract of July 1, 1925. The case is described in the opinion of the District Court as one wherein[31]

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[30] R. 666, lines 2-5; 406 F. 2d 572, c. 1 foot.
[31] R. 113, lines 18-29; 23 F. Supp. p. 49, c. 2, lines 19-33.

"a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private companies. The agency contract under which the companies were operating was challenged. The question before the court, as in this case, was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that the city charter was not being violated."

Solicitor Edwards' Opinion, supra, page 67, was rendered June 8, 1923, two full years before the contract of July 1, 1925.

The opinion of Secretary Ickes, August 24, 1935, recognizes that the contract of July 1, 1925 was negotiated, prepared and executed to make a contract of agency, which would be valid under the Raker Act and not to make a contract of sale in violation thereof.[32]

The Secretary said:[33]

"The contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company undoubtedly was drafted and executed with this section in mind [Section 6 of the Raker Act] and in the light of the suggestion contained in the Solicitor's Opinion of June 8, 1923, that a temporary arrangement be made for distributing power through the existing facilities of private concerns."

[32] U.S. Exhibit 11, R. 230-269.
[33] R. 247:13-21.

In its opinion, the District Court said:[34]

"To avoid further[35] violation of the law governing Hetch Hetchy power, S.F. entered into a contract with the P. G. & E. in 1925, whereby arrangements were made for the utility company to distribute the City's energy on its behalf."

(c) There is no ambiguous provision in the contract, but if there were, it would be the duty of the court to interpret it, if possible, to make it lawful and not unlawful, and hence to sustain an interpretation that the contract is one of agency and not one of sale.

The contract is short (less than three thousand words); can be quickly read, and will be found (so we think) not to contain any ambiguous provision.

If there had been any ambiguous provision, it would have been the duty of the Court so to interpret it (if possible) as to make it lawful and not unlawful, in accordance with the rule that an interpretation which makes a contract lawful is to be preferred over one which makes it unlawful. It would, therefore, have been the duty of the Court so to interpret the contract (if possible) as to sustain it as one of agency, and not to destroy it as one of sale.

"An interpretation which gives effect is preferred to one which makes void" (Sec. 3541, Cal. Civil Code, stating the universal rule); and "the principle that where two constructions of a written contract are possible, preference

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[34]R. 95, lines 15-19; 23 F. Supp. p. 43, c. 2, line 47 to p. 44, c. 1, line 1.

[35]This reference is to the sale of the electric energy from Early Intake Power House 1918-1923 by the Municipality to the Sierra and San Francisco Power Company and later to the Pacific Gas and Electric Company, supra, pp. 66-67.

will be given to that which does not result in violation of law." (*Great Northern Ry. Co. v. Delmar Co.*, 283 U.S. 686, 691 top, 1931.)

(d) Not only did the parties have the general purpose to make the contract one of agency but in all of the provisions thereof they manifested this purpose.

It is admitted (either in terms or by clear implication) that, not only did the parties intend as their general purpose to make the contract one of agency and not of sale, but that none of the provisions indicate or can be construed to show that the parties intended to make the contract one of sale and not one of agency. Thus, it is clear that, both as matter of general intent and as matter of specific intent, the parties intended the contract to be one of agency and not one of sale.

> "Throughout this contract the language of consignment is used. . . . true consignment is not a sale; it merely constitutes the consignee an agent of the consignor for a particular purpose—in this case to sell and distribute electric power. If there be a true consignment, the sale to the consumer is directly by the consignor. The consignee has not purchased the commodity himself and then resold it; he has merely negotiated a sale for and on behalf of the consignor." (Secretary Ickes R. 247:21-248:1.)

What is the meaning of this language of Secretary Ickes? It is this: At no time was there a breakdown in language in any of the provisions of the contract which would lead one to suppose that consignment (i.e. agency) was not the objective.

In Brief for the United States (p. 5) it is said that "the contract uses the terminology of consignment".

This being true, we must conclude, and we claim, that there is no provision in the contract which lends any color whatever to the idea that the parties intended to make it a contract of sale.

To like effect, is the statement in the opinion of the District Court, that the contract of 1925 "became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in Section 6 of the Act".[36]

The plain meaning of this quotation, from the opinion of the District Court, is that down to and through the execution of the contract of July 1, 1925, the parties assiduously sought by every provision in the contract to make it a contract of agency, and when they had concluded (in the language of the District Court), they hoped "that the arrangement heeded the admonition against resale of electricity which was set forth in Section 6 of the Act". Therefore, their unaltered purpose was to achieve a lawful contract and not an unlawful one, and every step they took in the drafting of that contract was with a view to make it effective as one of agency and not ineffective as one of sale.

In the opinion of the Circuit Court of Appeals it is said:[37]

> "It is conceded that the terminology used in the contract is that appropriate to an agency and not to a sale."

[36] R. 97, lines 1-5; 23 F. Supp. p. 44, c. 1, lines 40-45.
[37] R. 668, lines 1-3; 106 F. 2d 573, c. 1, lines 9-11.

(e) Inasmuch as it has now been made clear (so we submit) that the parties intended from the beginning to the end to make a contract of agency which would not violate the Raker Act, and were not seeking to make a contract of sale which they knew would be invalid, because in violation of the Act, it is important here to point out that they did not fail of their purpose in the draftsmanship of the contract, and that there is no theory of interpretation which would lead logically to that conclusion.

We have thus far shown that the case does not involve merely a general intent to make an agency contract but that intention was manifested throughout the draftsmanship. It is, therefore, proper to say that the contract is one of agency unless the parties, notwithstanding the foregoing, failed of their purpose, and it is pertinent to make inquiry on this point.

How then did they fail of their purpose? How does it happen that what they intended to be a contract of agency must be declared to be a contract of sale? If parties to a contract wish to make it one of agency and they maintain that unmistakable purpose throughout, they can only fail by obscuring their purpose and belying it by the use of language which makes them appear to be bent upon a sales contract when they are really bent upon an agency contract. If with a settled purpose to make an agency contract, they finally wind up with provisions which are clearly contradictory of that purpose, it might be said that the purpose never existed.

There are no such provisions in the contract. There are no provisions which show that the parties intended something different from what they did intend.

There is one other possibility: Parties having an unmistakable purpose may be thwarted by draftsmanship.

Such a case would arise where persons bent upon a particular intent employed provisions which made a contract such as they intended legally impossible.

In the opinion of the Circuit Court of Appeals, it is said:[38]

> "The intent of the parties to create an agency should be given effect unless they have so bargained that the ownership of the electric energy actually vested in the Company under the contract."

There are no provisions in the contract which make an agency legally impossible.

An illustration of a provision nullifying a purpose (if it can be called such) is this: A, dealing with B in respect of the White farm owned by A, prepares, without the advice of counsel, a document which he calls a lease and in which he recites that for a consideration in hand paid, he grants, bargains and sells the White farm to B, to have and to hold, etc. Here would be presented a case where the parties misused a word; thought the appropriate word for what they intended was "lease" but the substance of what they intended was a conveyance of the fee.

There is no similarity between such a situation and the one which we have here. As we have already said, this contract has less than three thousand words, and (so we claim) it has no ambiguous provision.

There is no provision therein which belies the intention of the parties to make an agency contract, and there is no provision therein which makes an agency legally impossible.

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[38] R. 668:17-21; 106 F. 2d. 573, c. 1, lines 28-32.

In those circumstances, the contract should be given effect according to the intention and draftsmanship of the parties.

(f) The attendant circumstances reenforce the incontrovertible and undisputed fact that the parties throughout their negotiations and in the actual execution of the contract, and in the events which immediately thereafter transpired, manifested their purpose that the contract should be one of agency and lawful under the Raker Act and not one of sale which they knew would be prohibited thereby.

The Raker Act, Section 9, subsection (s), provides that "the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant." (R. 34.)

The Municipality, by ordinance effective January 13, 1914, did "accept the said grant and all the terms and conditions therein contained" and on January 15, 1914, transmitted a copy of the ordinance of acceptance to the Secretary of the Interior.[39]

So much for the terms of the Raker Act and the acceptance thereof by the Municipality.

We have already mentioned the decision in *Los Angeles Gas & Electric Corporation v. City of Los Angeles*, 188 Cal. 307, 205 Pac. 125, decided February 25, 1922, supra, p. 21, and narrated the circumstances which resulted in the Opinion of Solicitor Edwards of the Department of the Interior on June 8, 1923, supra, pp. 64 to 67.

It is indicated in Solicitor Edwards' Opinion that he had been informed that the Municipality's construction

[39] R. 217:22 to 220:22; also R. 5.

work for a very large output of electric energy was nearing completion and he gave consideration to the difficulties which the distribution of, so large a volume at no distant date would or might entail.

All of these occurrences are reviewed in the opinion of the District Court.[40]

We now deal with what followed June 8, 1923.

The record does not contain any evidence of the progress of construction from June 8, 1923, although the early completion of Moccasin Creek Power plant was foreshadowed in the opinion of Solicitor Edwards.

Next came the contract of July 1, 1925.

We have already narrated, supra, pp. 67 to 69, and shall not repeat, the circumstances of the visits and long stay in Washington of representatives of the Municipality seeking the authoritative approval of the Secretary of the Interior to the contract as one of agency and valid under the Raker Act; the rendition of an opinion, not made public until August 24, 1935 of, Acting Solicitor Wright on July 20, 1925, that the contract was one of agency and did not violate the Raker Act (supra, pp. 67-69); the transmission of a copy of that Opinion by the Secretary of the Interior to the Attorney General; the Attorney General's reply; and the final closing letter of Secretary Work to the Mayor of San Francisco, then in Washington, supra, p. 69.

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[40] R. 94, line 23 to 95, line 14; 23 F. Supp. p. 43, c. 2, lines 26-46.

It would be difficult to conceive any line of conduct better calculated to show that the Municipality was bent upon making an agency contract which would be valid under the Raker Act, and not a contract of sale which they knew would be invalid thereunder.

Brief for the United States refers to the Opinion of Acting Solicitor Wright at the end of footnote 4, page 8, and at the end of footnote 8, page 18, and says that therein it is said that "the contract in form was one of sale". Evidently, the word "sale" was inadvertently used instead of "agency" because the Opinion of Acting Solicitor Wright was that the contract was one of agency. Moreover, he did not say that it was "in form" one of agency.

In order that the Court may have the text of his Opinion in convenient form, we print it in the Appendix hereto, pp. xxxiv-xxxix.

Thus, we have seen that, as stated, supra, p. 119, the attendant circumstances leave the fact incontrovertible and undisputed that the parties throughout their negotiations, in the actual execution of the contract, and in the events which transpired immediately thereafter, manifested their intention that the contract should be one of agency and lawful under the Raker Act and not one of sale which would be unlawful under the act.

(g) There is no justification whatever for the position taken in Brief for the United States, page 23, footnote 12, which would deny the applicability here of the rule that the intention of the parties to a contract must be effectuated based upon the false premise that the parties to the contract of July 1, 1925 "use terms to avoid the requirements of the law" and in the preparation of the contract sought evasion and avoidance of Section 6 of the Raker Act.

In footnote 12, page 23, Brief for the Unifed States says:

> "The circuit court of appeals said in its opinion: 'Although the mere terminology used in a contract will not necessarily determine its character, the court should give effect to the express intent of the parties unless the electric energy is actually sold to the Company.' It is no doubt a general principle of law that where no public interest is involved and the parties have a legitimate end in view, their written instruments are to be construed if possible to effectuate their intent. But where, as here, the parties use terms to avoid the requirements of the law, no principle requires a construction favorable to the effectuation of such terms. On the contrary, it is the plain duty of the courts to give full effect to the congressional policy embodied in the legislation sought to be evaded, and the transactions of the parties should be viewed in the light of the statutory purpose rather than from the standpoint of effectuating avoidance of the statute if possible."

The language assumes that it is in violation of law to make an agency contract.

If the law does not forbid an agency the parties were entitled to make an agency contract. It was never suggested prior to the above Brief filed March 8, 1940 and there is no evidence to warrant the idea, that there was

any evasion or unlawful purpose in the execution of the contract. The proper rule here to apply is "the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it". (*Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395 foot, opinion by Mr. Justice Holmes.) This argument of the Government is made, so we submit, to avert consideration of the fact that "the agreement is just what the parties intended to make it" or that "if that intention is clearly and unequivocally manifested, cadit quaestio" (Benjamin on Sales, 1st Am. ed. 1875, Section 309); or that "the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law." (*Great Northern Ry. Co. v. Delmar Co.*, 283 U.S. 686, 691 top (1931).)

(h) There is nothing in this case to justify the idea that by the contract the parties intended that the Municipality should "for a consideration" grant to the Company or endow it or vest in it a right to sell, nor that the consideration which the Government spells from the contract was intended to be such by either the Company or the Municipality.

The parties to the contract never intended the one to grant nor the other to receive the alleged contract right which the Government is at great pains to build up. It is attempting to put a status and obligations upon the parties which they never intended to assume.

The "consideration" which the Government attributes to the transaction was not given by the Company nor accepted by the Municipality as a consideration for any such "grant", as the Government seeks to deduce from the contract. It is a well-known rule that whatever might

be otherwise called a consideration must be intended to be such in order that it be so held.

"Nothing is consideration that is not regarded as such by both parties." *Philpot v. Gruninger*, 81 U. S. (14 Wall.) 570; *Fire Insurance Association v. Wickham*, 141 U. S. 564; *Wisconsin & Mich. Ry. Co. v. Powers*, 191 U. S. 379; *McGovern v. City of New York*, 234 N. Y. 377; *Allegheny College v. National Chautauqua County Bank*, 246 N. Y. 369; *Kirkpatrick v. Muirhead*, 16 Pa. St. 117.

11. The seven points, 1 to 7 inclusive, upon which the Government rests its argument that the contract of July 1, 1925 is one of sale and, therefore, unlawful, will be found, upon analysis, to be wanting in merit and to afford no justification for even the unsound method of interpretation put forward in the brief.

The seven points, 1 to 7 inclusive, advanced in the Brief for the United States as the bases for the conclusion that the contract of July 1, 1925 is one of sale and, therefore, unlawful, instead of one of agency and valid, are dealt with in the brief at pp. 22-34.

Following the analyses, the brief says (p. 34): "Even if no one of the above factors was sufficient by itself to characterize the contract as one of sale, which proposition is not conceded, it is submitted that the combination of so many factors pointing in the same direction compels the conclusion that the City is selling its energy to the Company for resale to consumers in violation of the conceded prohibition of the Raker Act".

In other words, although it is not so expressly argued therein, nevertheless the brief carries an implication that if any one of the seven points is found to be good, that upsets the contract. This suggestion is most striking evi-

dence of the fantastic method of approach to the consideration of the contract.

At no place in the consideration and treatment of these seven points is there any real recognition that the intention of the parties should be controlling or be entitled to any consideration.

It will be noted that there is no ambiguity in any of the provisions of the contract, nor that the parties intended (by any of the provisions reviewed in one or another of the seven points) that the title to the electric energy should pass from the Municipality to the Company, nor that they intended to make a contract of sale, nor that they did not intend to make a contract of agency.

These comments (so we think) will be found to be fully justified by the review of the seven points to which we proceed.

The First Point.

The first point of the Government is "The Company does not account for the proceeds of energy sold, but pays a price for energy bought." (p. 24.)

The point begs the whole question. The agreement of the parties was to diametrically opposite effect. They provided for an accounting for the energy in the most practicable way available in the circumstances of the case.

In considering this point, it is to be kept in mind that the energy, as used by the consumers, is different from the energy as received by the Company. In order to be usable, it must be stepped down in voltage and converted in some instances from alternating to direct current. (R. 292, 293.) The energy, therefore, as used by the consum-

ers, has different characteristics from the energy which the Company receives from the City. In view of these facts, the most practical method of accounting that the parties could employ was the one which they did employ, namely, that the Company should account for the energy received by it (and in the form received by it) rather than for the energy sold by it for the account of the City, which had different characteristics.

Moreover, the rate paid by the consumers of the Hetch Hetchy energy, included, among other things, (1) the cost of transmission, distribution and the provision of peak load and standby service and (2) a reasonable return upon the capital employed by the Company in these services. An accounting by the Company for the proceeds of energy sold to the consumers (and in the form in which it was sold) would require more elaborate and intricate bookkeeping than the parties thought necessary or, which was, in fact, necessary. The simplest method of accounting was that whereunder the Company would account for the energy it received at Newark, less transmission losses and with deductions for (a) the cost of transmission, distribution of peak load and standby service and (b) a reasonable return on the Company's capital employed in these services. This was the method of accounting which the parties employed, by the application of the formula expressed in the contract, which reflected the actual experience of the Company in respect of the matters dealt with. (R. 231-236.) To say that the method of accounting employed by the parties (which was the most practicable under the circumstances) converted what, otherwise, would be an agency contract into a sales contract, is to sacrifice substance to

form, to substitute theoretical for practical considerations, and to ignore, entirely, the intention of the parties.

In Secretary Ickes' Opinion it is said (R. 257:10-22):

> "Likewise my conclusion that the transaction is one of sale for the purpose of resale is not varied by the fact that payment to the City and County of San Francisco is, according to the terms of the contract, not at a fixed price but on the basis of determined percentage of a variable retail electric power rate. A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree. Consequently, this type of provision for payment cannot be said to change the transaction from one of sale to one of consignment."

In other words, the Secretary recognized that the proportional basis is prima facie indicative of a contract of agency, but that particular provision did not swerve him from holding that the contract is one of sale for the reason that "a contract of sale may include any terms or any type of terms for payment on which the parties can and do agree". (This should be likewise true in respect of a contract of agency, i.e., that it "may include any terms or any type of terms . . . on which the parties can and do agree".)

The Government says that the parties "never observed" the provisions of the contract for an increase or decrease of the Municipality's returns should there be a change of rates. The facts are these.

Mr. Vincent, called as a witness by the Government, testified (R. 299:2-17):

> "From August 1, 1925 to the end of December, 1937, estimating the three months of the year still to run, the average revenue of our Company from the sale of electric energy sold in San Francisco was 2.381 cents per kilowatt hour as compared with 2.383 cents per kilowatt hour used as the return base in the contract of July 1, 1925. This is a difference of less than one-tenth of one per cent and I would say that over the twelve year period that the contract has been in effect, it would amount to approximately $26,000.00. In stating that figure I mentally estimated that the total amounts paid to the City under the contract have been about $26,000,000, and one-tenth of one per cent is about $26,000."

The first lowering of rates—a lowering which resulted in a decrease in the average revenue per kilowatt hour during the year—was effective in 1935. At the end of the year it appeared that the average revenue per kilowatt hour in that year was 1% below the average of 1924 used in the contract. The fact was thus ascertained several months after Secretary Ickes' Opinion of August 24, 1935 and more than ten years after the execution of the contract. At the end of the year 1936 and when it was more than probable that the Government would shortly bring this action, it was ascertained that the average revenue per kilowatt hour for that year was 6% below the 1924 average, and at the end of the year 1937, which was subsequent to the commencement of this action, it was found that the average revenue per kilowatt hour for the year was 11% below the 1924 average, making an aver-

age drop of 6% for the three years. (Vincent, R. 296: 25-297:5.)

It is impossible to know during a year what average revenue per kilowatt hour for the year will result from changed schedules and it is therefore unavoidable to await the end of the year to know the necessary fact. (Vincent, R. 297:6-31.)

Notwithstanding these reductions, the Company continued to pay the Municipality without making any corresponding reductions in the amounts paid.

It is obvious that if this were a ground for determining that the contract was one of sale it could not have been applied in the first ten years of the life of the contract, i. e., between the execution of the contract on July 1, 1925 and the end of 1935.

Moreover, the bare fact that the Company was paying more to the Municipality than called for by the contract, in the changed circumstances, would not justify a decree enjoining the continued performance of the contract but if it called for any notice at all would call for one commanding the Company not to pay the Municipality any sum greater than that called for by Paragraph Eighth of the contract quoted above.

In point of fact, we submit the point is so attenuated that it neither affected the contract nor called for any action.

Mr. Vincent, testifying (R. 286:9-290:18) respecting Paragraphs Fourth and Eighth of the contract which we quote in appendix pp. vi, viii, suggested that as the contract was a day to day contract, a reduction in the amount

of payment might have involved a demand by the Municipality for a revision of the entire contract, and that by possibility under such a revision the Company might get less and the Municipality more than it had been getting before.

In this connection, Mr. Vincent testified as follows (R. 289:7-15):

> "The contract is subject to cancellation on 24 hours' notice by either party. It is a temporary contract. A contract of that nature is not a permanent contract. If one party wants consideration of one factor favorable to it the other party would certainly want a consideration of the other factors, unless they were bound by those particular factors for a term of years."

Even if Mr. Vincent's testimony were not in the record it could be easily and properly deduced that the Company thought that a change in the amount of return to the Municipality might bring about a reconsideration of the entire subject of revenue leaving the Company no better off than it then was.

Moreover, as stated above, the first falling off which was 1% of the theretofore yearly revenue per kilowatt hour was ascertained for the first time at the close of 1935 after the August 24, 1935 opinion of Secretary Ickes and while this litigation, although not actually commenced, was then in the offing.

The Second Point.

The second point of the Government is "The Company sells Hetch Hetchy energy to the City". (p. 29.)

The Government says that "the Company sells" electric energy "to the City" (p. 29) which "indicate[s] sale rather than agency".

The facts are these:

The contract on behalf of the Municipality was made by the Board of Public Works having lawful authority to deal with the problem. The powers then possessed by the Board of Public Works are now exercised by the Public Utilities Commission and the company deals with the Electric Power Bureau, a department of that Commission. (R. 413-415.)

The energy which is used in various Departments of the Municipality is paid out of separate municipal funds, appertaining to the respective departments which use the energy. For these reasons, the company, as a matter of convenience in accounting (not only as between it and the City, but, also, as among the various City departments which use the energy) bills the City for the energy in separate statements of account addressed to the respective municipal departments which use the energy.

The Municipality has its Moccasin Power House with lines leading therefrom to Newark where a connection is made with the Company's system which leads (say) into the City Hall. The officers and employees of the Municipality in the City Hall throw on or turn the switches, press the buttons or plug the sockets, and have the energy of the Moccasin Power House for instantaneous use. There is nothing said in the contract as to how the electric energy delivered to public buildings, etc., shall be dealt with as a mere matter of bookkeeping, and any rational system can be quickly devised if the one in

use is objectionable. There is nothing in the delivery of energy to Municipal Departments upon which to predicate an argument that the contract was one of sale and not of agency. The practice of billing each of the Departments of the Municipality for the electric energy consumed by it and paying over the amount thereof to the Electric Power Bureau (less the compensation of the Company) was an appropriate way of treating each Department as a separate entity in the matter of the consumption of electric energy.

If the different Departments of the Municipality were not billed for the energy used by them respectively, the Company would account to the Electric Power Bureau for that much less energy, but at the same time present its bill to the Bureau for 73.065% of the amount which would have been charged had the consumption been that of another, as compensation for its services in respect of energy delivered to the Departments of the Municipality. The matter is as broad as it is long.

The Circuit Court of Appeals said (R. 673 foot; 106 F.2d 574, c. 2, ft. 575, c. 1 top):

> "Nor does the fact that the City paid for Hetch Hetchy electric energy delivered to it by separate account at higher rates after it had been stepped down in voltage and converted in frequency, indicate a sale. This was a practical method of balancing the accounts between the parties and of compensating the Company for services performed in changing the character of the electricity and transmitting it to various points of municipal usage."

The Third Point.

The third point of the Government is "The Company fails to segregate revenues derived from Hetch Hetchy energy", which it is argued "further indicates that the Company is a purchaser and reinforces the inference of sale arising from the other provisions" (Br. 30).

There is no provision in the contract which requires or in any way mentions commingling of funds and no provision therein which would justify the commingling, if the commingling made the contract unlawful. In such circumstances, the contract being silent, the Court would not enjoin the continued performance of the contract but would require (assuming such a course to be proper and assuming also that separability of funds was essential to an agency contract), that the funds be kept separate.

The separability of funds is not rendered impossible by any provision of the contract nor by anything inherent in the course of business, and separability could have been easily observed had it been called for or desired.

Under paragraph thirteenth of the contract (Appendix, p. x), the Municipality and the Company may know from day to day and at the close of each day how much is payable in respect of energy delivered on that day, and on the fifteenth day of the following month the amount due in respect of deliveries in the preceding calendar month. No separate bank account was needed in order to sustain the agency and no construction should be allowed which, on that account, would turn a lawful agency contract into an unlawful contract of sale.

It is to be kept in mind that the money collected from the consumer is under the agreement partly the money of

the Municipality, as owner of energy, and partly the money of the Company, as distributing agent, and partly the money of the Company as owner of a portion of the energy. The contract is silent on how the collection should be dealt with. Rent collectors and stockbrokers making collections do not maintain a separate banking account for each buyer or seller. All the transactions pass through the account of the agent. There are decisions which hold that if an agent deposits the funds of his principal in his own account he is liable for the loss thereof, etc., but it has never been thought that an agent who did that was thereby to be turned from an agent into a vendee.

This is another ground of attack made upon the contract by the Government which could be easily remedied as, for instance, by the employment of an account for the collections identified as and called "Collections of Electric Energy paid for by Consumers in San Francisco", or in various ways whereby the point of view of the Government would be fully met.

The District Court said:[11]

> ". . . numerous grain cases . . . stand for the proposition that a mingling of goods is not considered irregular in many agency contracts. . . . Electricity, while different from grain, has been held to be personal property for legal purposes, and subject to the rules governing personal property. (Terrace Water Co. v. San Antonio, etc. Co. (1905) 1 Cal. App. 511, 82 P. 562; Lothrop Theatres Co. v. Edison, etc. Co. (1935), 290 Mass. 189, 195 N.E. 365, 307.)"

[11] R. 117 5-29; 23 F. Supp. p. 50, c. 2, line 26 to p. 51, c. 1, line 8.

The fact that we are here dealing with electric energy and not with wheat or flour does not call for the application of any different rule of law.

There is another aspect of the separability of funds in respect of electric energy which may be appropriately mentioned. It is set forth in the Opinion of Secretary Ickes:[12]

> "The difficulties surrounding the consideration of the present case are greater by reason of the character of the commodity which is the subject matter of the contract. Electric power is not a tangible, material thing. It can be stored only in quantities too small to be of significance in a sale or consignment contract. Because of its characteristics, power alleged to have been consigned by A to B cannot be segregated from other power owned by B; an accounting of the sales of the allegedly consigned power cannot be made by B separate from an accounting of the sales of his own power; the proceeds of the sales of the consigned power cannot be separated from the proceeds of the sales of B's own power; and any unsold surplus of the consigned power, even if it could be segregated, cannot for practical reasons be returned by B to A."

All that is said by Secretary Ickes may be true, but it does not advance the Government's attack on the contract for want of separability of funds. If a Municipality has electric energy inadequate for the requirements of its inhabitants and it chooses an agent for the transmission of its electric energy from the municipal generating station to the ultimate consumer and the agent adds the additional energy needed for the required supply, there is no

[12]R. 251:3-20.

difficulty in arranging proper accounting, and this is all illustrated by the performance of the contract over the years in which it has been carried out.

In the Opinion of the Circuit Court of Appeals it is said (R. 673; 106 F.2d 574, c. 2, lines 32-50):

> "The fact . . . that moneys collected by the Company are not segregated . . . is of little importance as showing a sale under the circumstances of this case. Here a public utility corporation is one of the contracting parties and a city the other. A practical method was adopted in arriving at its compensation to be paid for transmission and for the use of the Company's facilities. Assuming that the parties could make an agency agreement for distribution of the electric energy, it was open to them to contract in any manner they could agree upon."

Undue emphasis is given by the Government to commingling of the funds collected from the consumers of the City's energy with its own funds derived from sales of its own energy. So long as the Company accounts regularly to the City for the collections which it makes for the City, on the basis fixed in the contract, the fact that it deposits the moneys collected for the City in the same account with its own funds, certainly can not mark the contract as a sales agreement.

The Fourth Point.

The fourth point of the Government is "The Company names itself as sole creditor in bills to consumers" (Br. 31).

There is nothing in the contract of July 1, 1925, which even mentions billing. The contract therefore cannot be

declared to be invalid because the Company in practice has billed the energy to consumers in its own name and not in the name of the Municipality. If the practice pursued could be interpreted to create a sale which the contract did not create, the injunction granted in the District Court should have been against the practice of billing and not against the performance of the contract. Billing in the name of the Municipality could be easily put into effect.

Billing the customers in the name of the Company is no evidence of an intention on the part of the Municipality or the Company to have title to the municipal energy transferred from the Municipality to the Company either at Newark or at all. Throughout the country and in San Francisco, brokers and agents, rent collectors, and the like, issue due bills and receipts in their own name and not in the name of the principal, sometimes using the word "agent" and sometimes not using it. This practice, almost universal, has never been thought to transform a relationship of principal and agent into one of vendor and vendee.

The Opinion of the Circuit Court of Appeals said (R. 673; 106 F.2d 574, c. 2, lines 32-50):

> "The fact .... that the Company is the sole creditor named in the statements of account . . . is of little importance as showing a sale under the circumstances of this case. Here a public utility corporation is one of the contracting parties and a city the other. A practical method was adopted in arriving at its compensation to be paid for transmission and for the use of the Company's facilities. Assuming that the parties could make an agency agreement for

distribution of the electric energy, it was open to them to contract in any manner they could agree upon."

The contract does not require the Company to make a reference to the agency in the bills issued to the customers for energy, and, evidently, the parties, through the course of years, have not found the insertion of such a reference of any consequence either way, otherwise one or the other would have insisted thereon.

The inhabitants of the City may be supposed to have known that they were getting electric energy generated by the City, and that the bills were in accordance with an arrangement between the City and the Company, which had as much publicity as any arrangement could possibly have. Moreover, if the public did not know it, the contract was still an agency. We have innumerable instances in the law that an agent acts for an undisclosed principal, although he may hold himself out as acting on his own account. The farmer may consign the products of his farm to his broker to be sold. The broker finds the customer who buys the products. The broker bills the customer in his (the broker's) name, and the customer does not know who is the producer, nor does he care. This fact does not make the broker the purchaser from the producer. There would not be the slightest difficulty in having the billheads of the Company carry the information that it is acting as the City's agent with respect to the Hetch Hetchy electric energy; and this inconsequential change would dispose of the Government's argument that the billheads do not show the City as principal in the sale of the energy.

In the present case, the Company, if it so wished, might have advised its customers in billing them that it was selling a part of the energy consumed by them as agent for the City. The fact that it did not do so, is not a matter which would make or break the contract as an agency contract. It was a matter of such little consequence that the parties failed to cover it in the contract.

The Fifth Point.

The fifth point of the Government is "The Company is not subject to the City's direction in the fixing of rates to consumers" (Br. 31).

The argument of the Government on this point is twofold; (a) that the Company was authorized, at its discretion, to charge less than the rates prescribed by the Railroad Commission; and (b) that the City "abdicated its otherwise unfettered power" to fix its own rates "without regard to those established by the State Railroad Commission".

The first paragraph of the contract (R. 81, Appendix, p. iv) provides that the Company shall "collect from consumers of such energy the charges therefor which shall not exceed the lawfully established rates".

Section 23 of Article XII of the California Constitution provides that every "private corporation" furnishing heat, light, water or power is subject to control and regulation by the Railroad Commission. It has been held that the term "private corporation" does not include a Municipality and, therefore, that the Commission has no jurisdiction to prescribe rates for utilities conducted by Municipalities. (*City of Pasadena v. Railroad Commission*, 183 Cal. 526 (1920).)

It is, likewise, true that under the "Public Utilities Act" of California (Stats. 1915, pp. 115, 123) utilities subject to the jurisdiction of the Commission are required to file their rate schedules with the Commission and the Commission has power to determine and prescribe the rates, and the rates so prescribed cannot be changed except on order of the Commission made and entered after a hearing.

No utility subject to the Railroad Commission can sell its own energy except at the lawfully established rate and there can be no other. (*Sierra etc. Co. v. Universal Elec. Co.*, 197 Cal. 376, 382, syl. 4 (1925); *T. R. Miller Mill Co. v. Louisville etc. Co.*, 207 Ala. 253, 92 So. 797, 799, c. 2 ft., 800, c. 2 tp., 801, c. 1 ft.; syl. 3, 5 (1921-1922); *In re Independent Sewer Pipe Co.* (D. C. Cal. 1918), 248 Fed. 547, 550, syl. 1; *Louisville Co. v. Maxwell*, 237 U. S. 94, 98 (1915); *Kansas City Co. v. Carl*, 227 U. S. 639, 653 (1913); *Payne v. Clarke* (D. C. Cal. 1921), 271 Fed. 525, 526.

It is not argued that the price is fixed by the Company but it is said that the Company might fix rates below those lawfully established. This we have shown to be erroneous; but even if it were true, that circumstance would cut no figure in the case and the contract would still be one of agency.

It is not disputed that in the contract the Municipality adopted as the rates to be charged for its own electric energy those prescribed by law to be charged to the inhabitants of San Francisco for electric energy owned by the Company.

The argument is that the Municipality is not subject to commission regulation and could therefore sell its electric

energy to consumers in San Francisco at whatever price it pleased, and the fact that the City does not set its rates is "indicative of a sale" (Br. 32, l. 6).

Although the Government says that "the City abdicated its otherwise unfettered power under the state constitution to fix the rates" (p. 32), it does not argue that there is any objection to the Municipality adopting as reasonable rates to be charged for its own electric energy the rates prescribed by the Railroad Commission to be charged by the Company, but the fact that it does so is declared to be "indicative of a sale" (Br. 32, l. 6).

It is quite reasonable, so we submit, for a Municipality, as a matter of public policy, not to charge higher rates for the electric energy generated by it than the rates prescribed by the Railroad Commission for privately owned utilities.

The Municipality specified that the charges for its energy so to be sold should "not exceed the lawfully established rates" for such energy in San Francisco, knowing that its agent to distribute its energy was a public utility subject to the regulation of the Railroad Commission. The fact that it was exempted from such regulation did not forbid it to adopt as its own rates lawfully existing rates applicable to a private utility as the price which should be paid by its own inhabitants for the municipal energy.

It would have been possible for the Municipality and the Company to make an agreement into which there could have been copied the schedule of the Railroad Commission in force in 1924 without mentioning the Railroad Commission. Would not such a provision meet the argument of the Government, and if so, does not that show

that the point with which we are dealing is wanting in merit? Furthermore, the Municipality does no more in referring the rates for its energy to the Railroad Commission than a farmer does when he authorizes his broker to sell in Chicago or New York "at market".

What we have said above is reinforced by Paragraph Eighth of the contract (R. 85, Appendix, p. viii) which deals with the contingency that "the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority."

The Circuit Court of Appeals said (R. 672; 106 F.2d 574, c. 1 foot):

> "The contention is that the contract between the City and the Company does not fix the rates to be charged to the consumer, that the City had power to fix such rates as to electric energy owned and distributed by it and that the fact that the power to fix the rates was conferred upon the Company by the City indicates a sale of electric energy to the Company. In support of this contention it is claimed that the provision in the contract that the rates should not exceed the maximum rates fixed by law, that is, by the Railroad Commission, allowed the Company to charge any rates less than the maximum thus prescribed and therefore permitted the Company to exercise a right of ownership of the electric energy delivered to it by the City. The Company has charged the rates fixed by the Railroad Commission and the conduct of the parties and the eighth covenant of the contract providing for a change of the Company's compensation in the event of a change in rates indicate that it was the intent of the parties that these maximum rates should be charged to the consumers until changed by competent authority. There is no

> delegation by the City in the contract to the Company of any power to fix the rates to the consumer and if the City had the power to fix the rates by reason of its ownership it still retains that power unless it be assumed that the contract is one of sale instead of agency, which is the very point in dispute."

We wish to emphasize that there is nothing to show that the Company ever attempted to fix a price below the lawfully established rates or that there was at any time a lawfully established rate which the Company could vary either by increasing it or lowering it.

Furthermore, there is a very practical consideration which required the fixing of rates respecting the City's energy to be made just as they are made, i. e., by the Railroad Commission. The City's energy after being stepped down in voltage and converted in part to direct current by the Company (as it must be before becoming usable) is not different from the Company's energy. There could not be two rates charged to San Francisco consumers for simultaneous delivery of the City's energy and the Company's energy used to supplement the City's energy. In view of the fact that the Railroad Commission under the Constitution and laws of California was required to fix the rates for the Company energy, practical considerations prompted the City to agree that the rates fixed for Company energy should be the rates paid for municipal energy.

The Sixth Point.

The sixth point of the Government is "The Company has complete control of the energy" (Br. 32).

The Opinion of the Circuit Court of Appeals says (R. 670, 106 F.2d 573, c. 2, lines 33-54):

> "To say that the Company has exclusive control over the energy once it enters its system at Newark is to overlook the factual situation in regard to the transaction. What loss of control amounts to in this case is merely that the City delivers the electric energy to lines of the Company at Newark. Generation and consumption of the electric energy are simultaneous. The City generates the power and controls the power plant. The ultimate consumer obtains the electric energy by turning his switch, plugging his socket, or pushing a button, etc. Thus, to compare the control of the electric energy by the Company during the time of its transmission (about 1/4650 of a second) with the control of an agent or wholesaler of ordinary merchandise is to overlook what actually takes place in the transmission of the energy. The only control of the Company is that it controls its distribution facilities."

The Government gives exaggerated emphasis to the control of the load dispatcher of the Company. (R. 283.) The function of a load dispatcher is to indicate in advance to the generating plants what amount of energy they may reasonably expect to be called upon to furnish. In the exercise of his discretion, when he has many plants owned by his Company, he increases or decreases the requirement from one or another. The amount of power that comes from Moccasin to Newark "is governed by our load dispatcher within the limitations of the contract"

(Vincent, R. 285, lines 11-12); and the load dispatcher "has not entire freedom" for "he is limited by . . . contractual obligations" (Vincent, R. 303, lines 8-10). In the case of the Moccasin power, therefore, he has no discretion at all, because the output of the Moccasin plant is inadequate for the municipal requirements, and, as the Company is required by the contract to pay for that amount if it does not take that amount, it necessarily calls for and accepts all the energy specified in the contract and gives priority to that energy over any energy from the Company's own or from other sources. Of course, it advises the Moccasin plant of the varying demands through a day, but that does not alter the priority which the Moccasin plant receives.

Speaking to a related point, the Opinion of the Circuit Court of Appeals says (R. 671; 106 F.2d 574, c. 1, lines 35-48):

> "One of the points mainly relied upon by the United States as showing a sale is the fact that the City is assured of payment and the obligation of the Company to pay for the electric energy delivered at Newark is unconditional. But in view of the circumstances of this case, where the amount of electric energy supplied did not fill the requirements of the Company, this provision merely amounts to an agreement by the Company to dispose of the City's electric energy ahead of its own and a guarantee of disposition of all energy supplied under the contract."

The point under consideration does not arise out of any specific provision of the contract because there is no specific provision dealing with "control". The only loss of control by the Municipality (whatever that loss of con-

trol may be) arises from and is referable solely to the fact that the Municipality delivers its electric energy to the Company at Newark. All loss of "control" arises from that simple fact, and to say that delivery of the energy by the Municipality to the Company involved a loss of "control" which made the contract one of sale amounts to a contention that there cannot be an agency contract inasmuch as there must be a delivery of the electric energy whether the deliveree be treated as agent or buyer.

This argument would nullify the suggestion contained in the opinion of Solicitor Edwards of June 8, 1923, that a lawful arrangement could be made for delivery of energy by the Municipality to the owner of a distributing system for transmission over its lines for the account of the Municipality and as the latter's agent.

The argument ignores the fact that the generation and consumption (or consumption and generation) of electric energy are practically simultaneous; that it cannot be said that one precedes the other by a moment of time during which any control could be exercised; and that the ultimate consumer causes the generation of the energy by throwing or turning on his switch or plugging his socket, or pressing his button, etc., all of which has been fully set forth, supra, pp. 82, 144.

Underlying the argument here under review is the erroneous idea that delivery of electric energy is or might be comparable to the shipment of a carload of celery, say, from Stockton to New York for sale by the consignor's broker "at market", or a shipment of livestock from, say, Bakersfield to Chicago for sale by the

consignor's livestock broker there "at market". In either event, the shipper could stop the shipment or divert it to another point while in transit. Such transactions are not comparable to deliveries of electric energy and the ideas which arise out of them (seemingly underlying the argument of the Government) have nothing to do (so we submit) with the case with which we are presently dealing.

The following authorities dealing with agency in the case of commingled goods are helpful to a conclusion respecting the point now in hand.

In *Dryden v. Michigan State Industries*, 66 Fed. (2d) 950 (CCA. 8, 1933), the Court held that the contract there reviewed was a *consignment* contract and not a *sales* contract, despite the fact that there had been a commingling of the goods of the consignor with like goods of other persons.

In *In re Klein*, 3 Fed. (2d) 375 (CCA. 2, 1924), the Court held that goods sought to be recovered by the petitioner had been *consigned* to a bankrupt and *not* sold to him. In this connection, the Court said (p. 379, c. 1):

> ". . . The goods might have been mingled with others the last days of the bankrupt's business or by employees of the receiver. The failure to place them in a separate location in the store, of itself, would not defeat the petitioners' claims."

To the same effect, see *McCallum v. Bray Robinson Clothing Co.*, 24 Fed. (2d) 35 (CCA. 6, 1928), and particularly paragraphs 4-6 at page 37, c. 2.

In *Colorado-New Mexico Wool Marketing Assn. v. Manning*, 96 Colo. 86, 40 Pac. (2d) 972 (1935), it was held that a contract of a wool grower with a wool marketing association was one of *agency* or *consignment* and not of *sale*, notwithstanding that the contract provided, as stated in the opinion, as follows (p. 973, c. 2):

> ". . . the grower agrees that the association may sell the wool delivered to it, may borrow money on it, may commingle it with other wool, and may exercise all other rights of ownership over it."

In *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022 (1898), the Court held that one may be an agent to introduce certain manufacturers' goods, though he sells them to customers of his own.

First National Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681 (1889), involved a contract under which various dairymen furnished Kilbourne with dairy products to be manufactured by him into butter and cheese and sold by him in the course of his business as a dairy produce dealer. The Court held the contract to be one of *agency for sale* and *not* a *contract of sale*.

See also

Walther v. Williams Mercantile Co., 169 Fed. 270, 273 (CCA. 6, 1909);

1 *Mechem on Sales* 27, Sec. 25.

See, also, reference to opinion of the District Court respecting grain cases which dealt with the mingling of goods, *supra*, p. 134.

As we have already said, there is no provision in the contract which deals with "control", and if this be an omission, an appropriate provision will be supplied by the law; and we submit that what is supplied by the law cannot be unlawful. Moreover, the Municipality retains control for the reason, among others, that by the contract of agency, the Municipality specifies what the Company is to do.

If there were any particular kind of control necessary to this agency contract (which we submit there is not) the law, covering an uncovered matter, will do the needful and do it lawfully.

The Company does not control the output of the Municipality's plant. The Municipality, through its contract, controls the acts of its agent, and the consumers determine the volume of demand for the Municipal energy.

Even if the contract of July 1, 1925 purported to grant control over the energy to the agent (which it does not) this fact would not convert the contract into one of sale.

In "Restatement of Agency", Vol. 1, § 14, sub. (b), it is said (p. 48) that a person may contract with an agent "not to exercise control." One of the chief distinctions between an agent and a servant is that the agent, ordinarily, enjoys freedom from control, in respect of the manner in which he carries out the business of his principal, whereas the servant is usually restricted in the manner of his operations. It is to be observed that much of the confusion in the Government's argument results from applying to the relation of principal and agent the rules that apply to the relation of master and servant.

It is well recognized that an agent authorized to effect sales on behalf of its principal may fix the price, terms and conditions of sale (2 Am. Jur., p. 98, "Agency", § 120; Mechem on Agency, § 854; Mechem on Agency, § 2503 (referring to factors); 2 Cor. Jur. Secundum, p. 1319, "Agency", § 114 (bb); 2 Cor. Jur. Secundum, p. 1321, "Agency", § 114 (ee)) and that an agent is frequently authorized to "select the purchaser" and fix the "time and place of delivery".

Mechem on Agency, § 854;

2 *Cor. Jur. Secundum*, p. 1322, "Agency", § 114 (ff.).

In 2 Am. Jur., p. 98, "Agency", § 120, it is stated that an agent with general authority to effect sales is deemed to have ostensible authority "to fix the terms of sale, including the time, place, mode of delivery, and the price of the goods, and the time and mode of payment".

Many instances might be adduced to illustrate the distinction between an agent and a servant, and, thus, to make apparent the underlying fallacy in the Government's argument as applied to the contract here in issue, but we believe that those already given are sufficient for the purpose.

It is physically possible, of course, for the Company to refuse acceptance of Municipal energy at Newark, but that would not be in furtherance of but in violation of the contract.

The Seventh Point.

The seventh point of the Government is "The Company bears the risk of loss". (Br. p. 33.)

Upon this point it is said that "It is well recognized by the cases that the risk of loss accompanies title to the goods in the absence of a contrary expressed intention." (Br. p. 33.) The risk of loss, of which the Government speaks, is said to arise from the absence of a provision in the contract for "deduction for the actual physical loss which might arise from fortuitous causes, such as accident or theft." (Br. p. 34, ftn. 19.)

There is no provision upon this subject in the contract, and the argument of the Government is that the failure to provide against these nebular and remote losses, makes the contract one of sale and not one of agency, although we have shown, abundantly, that the intention of the parties was that it should be one of agency.

Furthermore, *Donlan v. Turner, etc. Co.* (CCA 9, 1922), 282 Fed. 421, dealing with the general rule that loss follows title said (p. 424): "But the rule is not without exceptions, for not infrequently are valid agreements made where the property is in one and the risk in another", which is conceded by the government (Br. 33, lines 16-17).

We submit that the possibility that the Company may at some distant date suffer some physical loss through "accident or theft" which has not happened in the past fifteen years would be insufficient to establish that a contract intended to be one of agency was one of sale.

Some Additional Points.

The Government in a casual way, or by suggestion or innuendo, brings into the case certain additional objections to the contract which we briefly review.

(a) If the delivery be a "consignment" at Newark, it may nevertheless be a "sale" at the consumer's switch. This point, which is not a new one in the case, is made in footnote 14, p. 27 Br. U.S.

The answer is that the matter is governed by the intention of the parties. As there was no intention to transfer the title at the consumer's switch the title was not transferred.

(b) By innuendo, the Government attacks the contract on the ground that the sale of municipal energy was to those who before that time had been customers of the Company. (Br. 31, ls. 4-8.)

This in fact is not a point but it is a parenthetical innuendo. It may be briefly answered:

If there be a single utility, publicly or privately owned, furnishing all the electric energy consumed by a municipality and its inhabitants, cases like those cited by the Government below that "disposal of goods to regular customers in the usual course of trade indicates a sale" afford no analogy. "Regular customers" is not a term suitable for use when applied to a public utility which is supplying all the electric energy used by a municipality and all its inhabitants.

As indicated, there are decisions wherein (while casting about to find whether a contract the nature of which is in dispute between the parties thereto) it is said that if the ultimate consumers were the regular customers of the

person who was agent or vendee, as the case might be, that was a circumstance having tendency to indicate a sale. The cases considering the commodities dealt with therein, however, afford no analogy to electric energy, particularly in the circumstances here; and there are authorities to contrary effect.

In *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022 (1898), the Court held that one may be an agent to introduce certain manufacturers' goods, though he sells them to customers of his own.

In *First National Bank v. Kilbourne*, 127 Ill. 573, 20 N. E. 681 (1889), involving a contract under which various dairymen furnished Kilbourne with dairy products to be manufactured by him into butter and cheese and sold by him in the course of his business as a dairy produce dealer, the Court held the contract to be one of agency for sale and not a contract of sale.

See also *Walther v. Williams Mercantile Co.*, 169 Fed. 270, 273 (CCA 6, 1909).

The consumers of the electricity were all of the inhabitants of San Francisco. The Company, as owner, had theretofore sold its electricity to them. When the Municipality wished to distribute its energy to the inhabitants of San Francisco, the Company agreed to act as distributor and in the capacity of an agent. The fact that the Company delivered the municipal energy to the persons for whom the Municipality designed it is no evidence of a sale even if before that time the Company had been selling its own energy to those self same persons.

Disposal of goods by an agent to his own customers in the usual course of trade does not indicate that the agent

has title to the goods, or that he is selling for his own account, and not for the account of a principal.

(c) The Government dwells upon the provision in the contract whereby the Company is required to pay for all of the energy up to a 75% load factor even if it does not accept the energy at Newark (Br. p. 5 middle and fn. 1; p. 6 top, p. 7 middle).

At the outset it is to be noted that the municipal electric energy has never been equal to the requirements of the inhabitants of San Francisco, so that the Company has never been called upon to pay for electric energy beyond its needs and the point is purely academic.

> "As a practical matter, S. F. has been able to utilize the full capacity of Hetch Hetchy power even during off-peak periods. Thus the Company has not been forced to pay for electricity which it has neither accepted nor sold. The written contract is inconsistent with an agency agreement, but the fulfillment of its duty-to-pay provision is not. As carried out, the 75% load factor term has meant that preference is given to Hetch Hetchy energy by the Company, when consumer demand is low." (Opinion of District Court, R. 115, fn. 13; 23 F. Supp. p. 50, c. 2, fn. 13.)

The inadequacy of the City energy for the San Francisco load and the amounts by which it falls short appear infra, p. 165. The engagement on the part of the Company may be treated either (a) as a guarantee to dispose of a definite output; or (b) as imposing a duty upon it to dispose of the energy of its principal before disposing of its own. Upon the latter point, see Opinion of Circuit Court of Appeals quoted supra, p. 145.

The obligation to pay, if delivery is not accepted cannot be treated as an indication of a sale because if the consumers do not require the energy, it cannot be generated and delivered to the Company at Newark, and the idea of a sale of energy not generated involves a contradiction in terms.

Parties to a contract of agency may agree upon any lawful terms, and an agent might well guarantee to find a market and consumers for the product of his principal without becoming himself a purchaser from the principal.

> "The P. G. & E. has a duty to pay S. F. for electricity available at Newark, on the basis of a 75% load factor. That duty might not be fatal to an agency contract; . . . In a normal agency, the agent effects a transfer and is not responsible for payment unless the commodity is actually delivered to him and sold by him." (Opinion of District Court, R. 114:25-115:4; 23 F. Supp. p. 50, c. 1, lines 7-17.)

> "Buyer and seller are always free to provide by express agreement how, when and by whom, the risk of loss is to be borne. . . . A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree." (Secretary Ickes' Opinion, R. 256, lines 26-28; 257, lines 16-19.)

This is equally true of principal and agent and of contracts of agency.

If therefore the Company was willing to incur the risk of assuming that it would be able to market the entire output of the Municipality "on the basis of a 75% load factor", it was at liberty to agree that it would do so. Such an agreement, borrowing the language of the opinion of the district court, might not be fatal to an agency

contract", to which we should care to add "would not be fatal to an agency contract."

This answers the suggestion that (a) the Company is bound to pay for all energy delivered to it by the Municipality whether or not it is taken by consumers; and (b) has assumed in addition an obligation to pay for all energy offered to it even though not accepted by it.

(d) It was argued by the Government below (and the District Court mentioned the argument) that the fact that the accounting is limited to monthly statements by the City to the Company for electricity delivered at Newark is indicative of a contract of sale.

The point thus taken is that the contract is one of sale because when the day of monthly payment arrives, or shortly in advance thereof, the Municipality sends the Company a debit tag showing the amount payable by the Company to it, whereas in cases of agency (so the Government in effect argues), the agent sends the principal a credit tag. This (we submit) is a very thin point. The employees of the Municipality's electric system have the means at hand of knowing at the close of each day what will be payable to the Municipality on the fifteenth day of the following month in respect of that day's delivery, and the fact that a debit tag is sent by the Municipality rather than a credit tag by the Company is hardly to be taken into account. There is nothing in the contract which provides for this method of doing business and if the practice put in doubt the fact that we have here an agency contract, the practice can be quickly changed. Instead of a debit tag sent to the Company, a credit tag can be sent to the Municipality.

In connection with this point, it is to be kept in mind that the contract entitles both the Company and the City to read the meters at Newark daily so that both may be apprised of the amount of energy delivered from day to day and, thus, have an accurate basis of accounting. Under these circumstances, it is clearly immaterial who furnishes the statement of the amount of energy delivered by the City to the Company.

(e) There is one other matter which may or may not be intended as a criticism of the contract. Against the possibility that the suggestion with which we deal is intended as a criticism, we give brief explanation in respect thereof.

In footnote 1, page 5 of Brief for the United States, after pointing out that "load factor" is the ratio between the average actual load, and the maximum load capacity of a plant, it is said that the provision in the contract of July 1, 1925 that the output of Moccasin plant to be delivered to the Company on a 75% monthly load factor, means that "if the maximum monthly production capacity of the Moccasin plant were 100,000 kilowatts, the Company would be required to accept or pay for not more than 75,000 kilowatts per month". Thus, the idea may be conveyed (whether so intended or not) that the contract requires (or permits) a limitation of output or wastage of 25% of the total production of which the Moccasin plant is capable. This is the first time that such a suggestion has arisen. There is nothing in the record to show why or at whose request the provision was inserted in the contract for the delivery of electric energy "at not to exceed a 75% monthly load factor". It may well have been intro-

duced at the instance of the Municipality because of the limitations of its plant.

In a hydro electric plant (such as the Moccasin plant) the amount of water available and the generating machinery will determine the output of the plant. When a 75% load factor is spoken of, we mean that the amount of water available or other limitations of the plant will not permit of a generation of electricity to maximum capacity for more than three-fourths of the time. This is what is meant in the contract of July 1, 1925. The contract requires the City to deliver and the Company to accept "the entire energy output" of the Moccasin plant (R. 80, 81). The provision limiting delivery "at not to exceed a 75% monthly load factor" is simply a recognition of the physical limitations on the City's plant which prevent it from maintaining a maximum production for more than seventy-five per cent of the time.

Thus we bring to an end the review of the argument of the Government in the seven objections to the contract in terms made, and four more resting in suggestion and innuendo.

We submit that there is no justification for the argument of the Government that the contract of July 1, 1925 was a contract of sale and not one of agency, because or on account of any one of the eleven points, or all of them en bloc.

In closing the analyses, we wish again to point out that the Government in reviewing the contract is not seeking

the intention of the parties, but in fact, wholly disregards it.

In no instance has the Government considered any of the points with a view to reaching a conclusion as to what the parties intended thereby nor how the pertinent provision should be interpreted considering its environment. The whole purpose of the Government's argument, so we submit, is to ascertain whether particular provisions of this contract are frequently found in sales contracts, and if so, to argue that this contract is one of sale, although intended to be otherwise—an intention shown aliunde and by the language of the agreement.

Moreover, the Government in its argument does not seek to treat the contract as a whole nor weigh nor balance all of its provisions; nor give any heed to those of them which were introduced into the contract to effectuate and further the purpose of an agency.

It would seem, so we submit, that this manner of treating a contract is without parallel.

12. **The so-called findings of fact respecting the interpretation and meaning of the contract are not to be regarded as findings at all, considering (a) that questions respecting the construction of a contract are questions of law and not of fact, and (b) that the contract is plain and unambiguous and (as the Government conceded below) has been fully performed in all particulars, except one which arose ten years after the execution of the contract, and in respect of which the Government contends that the Company should in the years 1935, 1936 and 1937 have accounted to the Municipality for smaller sums than it actually accounted for in those years. Furthermore, there was no evidence extrinsic to the contract which in any manner varied the terms thereof, and hence any finding in conflict with the plain terms and legal effect of the contract is unsupported by the evidence and should be rejected, quite apart from the fact that the case being one in equity, the findings are at large in this Court.**

We submit that the contract in its entirety is plain and unambiguous.

The Government conceded below that the contract had been fully performed with the exception that the Company did not follow reductions in rates by reductions in the amounts accounted for to the Municipality in the years 1935, 1936, and 1937. In Brief for Appellee, C.C.A., March 10, 1939, page 14, it is said "With this exception, the contract has been enforced (R. 289)".

At the conclusion of the Opinion of the District Court, filed April 11, 1938 it was said: "This opinion may stand in lieu of the written findings of fact and conclusions of law." (R. 125.)

However, counsel for the United States proposed independent "Findings of Fact and Conclusions of Law",

May 18, 1938. (R. 125-136.) The Municipality proposed amendments June 1, 1938. (R. 137-157.) The District Court signed the Findings as proposed by the Government, apart from slight and inconsequential changes, June 24, 1938. (R. 157-167.)

The Municipality took proper exceptions to the findings in the opinion and to the independent findings as filed and made the same the basis of assignments of error properly reserved. If the opinion be regarded simply as an opinion, the exceptions thereto and assignments of error will be disregarded; however, the exceptions and assignments of error are in order on either hypothesis.

The so-called findings are on matters of law and should be disregarded as findings of fact, and, moreover, there is no evidence to sustain them in the instances where the interpretation of the contract departs from the lawful interpretation. Furthermore, if they properly interpret the contract, they contribute nothing to the case, and if they misinterpret the contract, they are nugatory. There is no evidence in the case apart from the contract itself upon which to predicate any interpretation of it different from the interpretation which, as matter of law, would be affixed to it.

As this is an equity case, it is to be here heard and determined as a case de novo; this Court is not concluded by any finding of the trial Court, however much it may defer to the latter in respect of matters which are strictly findings of fact and have substantial evidence to support them. *Waterloo Mining Co. v. Doe* (CCA. 9), 82 Fed. 45; *Presidio Mining Co. v. Overton* (CCA. 9), 270 Fed. 388, 390; *Mt. Vernon Refrigerating Co. v. Fred W.*

Wolf Co. (CCA. 6), 188 Fed. 164, 168; *Erhard v. Boone State Bank* (CCA. 8), 65 Fed.2d 48, 50; *O'Brien's Manual of Federal Appellate Procedure*, p. 57. The construction of the contract is a matter of law for the Court because there are no disputed questions of fact, and if there were, the construction would be still one for the Court in the light of the conclusions reached in respect of the disputed facts. *California W. D. Co. v. California M. O. Co.*, 178 Cal. 337, 341, lines 25-28; *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 18-21, par. 4.

In an annotation entitled "Province of Court and Jury respectively as to construction of written contract where extrinsic evidence as to intention has been introduced", 65 A. L. R. 648, 650, the latter of the above two cases is quoted with fullness, followed by an assemblage of cases throughout the country to like effect.

So are the following:

"Where a contract is in writing, the determination of the legal effect of the writing or the facts in creating an agency or sale is for the court." (Syl.)

"The question for decision is: Is the agreement a contract of sale, or is it a contract of agency? It is well settled that, where the contract is in writing, the determination of the legal effect of the writing, or the facts in creating agency or sale is a matter for the court. Mechem on Agency (2d Ed.), § 50." (*Coles v. Somerville*, 47 Nev. 306, 310, 220 Pac. 550, 551 foot [1923].)

"Where the contract is in writing or the facts are not disputed, the question whether the writing produced or the facts admitted operate to create a sale

or an agency to sell is one of law to be decided by the court." (1 *Mechem on Sales*, § 50, p. 62.)

"'What a contract means is a question of law. It is the court, therefore, that determines the construction of a contract * * * They [the court] give to the jury, as a matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take.'" (*Graham v. Sadlier*, 165 Ill. 95, 97, 46 N. E. 221, 222.)

See, also: *Equitable Life Assur. Soc. of the United States v. Wells*, 101 Fed.2d 608; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291; *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 397.

13. There is a clear and fundamental fallacy (so we submit) in the method which the brief employs in the interpretation of the contract to its destruction, by casting it, by construction, into a category which the Government argues makes it illegal whereas, if it were permitted to remain in the category in which the parties intended it to be, it would be effective and lawful.

The brief practically takes no notice of the importance of intention in the construction of a contract. The "intent" of the contracting parties is mentioned in the brief only twice; first, in footnote 12, page 23 of the brief which we have quoted at length and discussed, supra, p. 122; and second, in the sentence, "It is well recognized by the cases that the risk of loss accompanies title to the goods in the absence of a contrary expressed intention". (p. 33, lines 14-17.)

The Government seems to have assembled all available cases which involved dispute as to whether a transaction was a consignment or a sale and whenever it found, in one of those cases, an element present or which it regarded to be present, in the contract of July 1, 1925, it seized upon that element as an argument that the contract is one of sale.

This explains why the Brief does not deal with "intent" and "intention" and uses phrases such as these: A feature of the contract "indicates" or is "indicative" of a sale (p. 24, line 4; p. 25, line 18; p. 29, lines 5-6; p. 30, line 20; p. 32, line 6; p. 33, line 1); or justifies the "inference of sale" (p. 30, line 21); or is "ordinarily considered an earmark of sale" (p. 31, lines 11-12); or that "the transaction is normally one of sale" (p. 31, line 19); or a "combination of so many factors pointing in the same direction compels the conclusion that the City is selling its energy to the Company for resale". (p. 34, lines 7-10.)

The arguments in the brief are in hostility to true construction and to established rules which require the Court to arrive at the intention of the parties and to give it effect if it be consistent with the language which they have employed.

At no time does the brief suggest the idea that the provisions which it instances are legally irreconcilable with a contract of agency. It contents itself, for the most part, with phrases like those above quoted and these in addition: "characteristics of the arrangement furnish the strongest evidence" of sale (p. 11, lines 23-25); a named "factor is virtually conclusive" of sale. (p. 25, line 7.)

At no point in the brief is it indicated that there is any reason why a contract of agency may not borrow provisions frequently employed in sales contracts without making the parties pay the penalty of having the contract nullified and destroyed.

There is no indication what relative importance is attached to particular provisions and no means whereby to know except the weak implication in Brief for United States supra p. 124, which of these points could be wanting in merit and the Government still maintain its argument. Would the argument still be made that the contract is one of sale if three or five of the points made in the brief to prove it such were shown to be erroneous?

14. There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, or that the congressional policy which underlies Section 6 is any broader than that expressed therein.

The Municipality did not possess and could not generate a supply of electric energy equal to the requirements of its inhabitants. The City energy is only about one-half of that required to supply the San Francisco load. (Vincent, R. 295:4-6.) The Municipality's deliverable output of energy is from 67,000 kilowatt hours (Vincent, R. 295:26) to 73,000 or 74,000. (Vincent, R. 303:18.) In winter evenings the peak load is about 225,000 (Vincent, R. 295:23) and the Municipality's contribution would therefore not amount at those times to one-third of the requirements.

House Report 41, supra, p. 41, says that "The power potentiality of the stream is estimated at 115,000 horsepower in its ultimate development. It is proposed to de-

velop this energy in 10,000 horsepower units, and use the power for public purposes in San Francisco and adjoining cities".

If we assume that one horse power is equivalent to 750 watts, 115,000 would be equivalent to 86,250 kilowatts. (One horse power is equal to 746 watts only.) This figure is comparable to the Municipality's deliverable output just mentioned and is far below the present electric energy requirements of the inhabitants of San Francisco.

Congress did not expect that the development of electric energy would equal the potentiality of 115,000 horse power for many years following the passage of the Act. The obligation imposed on the Municipality to generate electric energy was limited to 60,000 horse power (45,000 kilowatts) within twenty years "from the date of the completion of said portion of the works"; 10,000 horse power (7500 kilowatts) within three years; 20,000 (15,000 kilowatts) within ten years; 30,000 (22,500 kilowatts) within fifteen years; and 60,000 (45,000 kilowatts) within twenty years. (Raker Act s. 9, ss. (m), R. 29, 30.) (We assume these periods of time are to be computed, in the circumstances which happened, from, say, July 1, 1925.)

"Nothing whatever is said in the Raker Act with reference to the acquisition or construction of a distributing system within the City of either water or electric energy." (Opinion, CCA., R. 664, lines 5-7; 106 F.2d 571, c. 2 foot.) On July 1, 1925 "the City had no distributing lines or system and had not completed its transmission lines

beyond Newark" but "it had constructed its power plants and had impounded water sufficient to generate a large amount of electric energy which would be wholly lost if the water, as it passed through the dam and canals of the Hetch Hetchy project, were not utilized for that purpose. In this situation, on July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy generated at the Moccasin power plant of the Hetch Hetchy project". (Opinion, CCA., R. 665, line 20 to 666, line 2; 106 F.2d 572, c. 1, lines 39-54.)

All that the Company was to receive under the agreement was "compensation covering its operating expenses and use of capital".[13] Opinion, CCA., R. 667, lines 16-17.)

The price and terms under which the energy was to be distributed to the inhabitants of the Municipality were fixed in the agency agreement, and the Municipality's absolute control over the situation was made doubly sure

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[13]This was proved by the testimony of N. Randall Ellis, Chief Valuation and Rate Engineer for San Francisco, attached to the City Attorney's Office (R. 435). A question was put to Mr. Ellis whether, in his opinion, the allowance to the Company under the contract, "represented the actual expense" of the Company in distributing the electric energy, "including a reasonable return on the capital required for that purpose", and he answered "Yes". An objection was then made to the question and was sustained, but no motion was made to strike the answer. We claim that, in the absence of a motion to strike the answer, it is evidence in the case. Moreover, the answer did no more than sum up previous testimony (R. 435) given by Mr. Ellis without objection. We claim that the question to which the objection was sustained, was pertinent, and, in any event, the ruling of the Court in sustaining the objection is here for review. (106 F.[2d] 572, col. 2, lines 47-49.)

by the one day right of termination. The Company had no alternative but to furnish the additional electric energy, which added to the municipal energy, would equal the requirements of the inhabitants of San Francisco.

There is no manifestation of congressional purpose which would be set at defiance by this simple and unavoidable expedient. "The arrangement made was a practical method of utilizing a public utility corporation as an agent to distribute power generated by the city to its customers in the city." (Opinion, CCA., R. 670 ft.; 106 F.2d 573, c. 2 ft.)

There is nothing in Section 6 which requires that municipal energy shall be sold directly to consumers without the intervention of an agent.

There is a marked difference between public ownership and public operation. Obviously, Section 6 does not command public operation and there are no prohibitive words therein which would drive the Municipality thereto, leaving it no alternative.

The idea that Section 6 required the Municipality to operate its own distributing system was rejected in the Opinion of Secretary Ickes as follows (R. 244:19-27):

Secretary Ickes' Opinion.

"The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, **while true** (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Fran-

cisco by a mandatory Congressional enactment." (Underlining ours.)

Congress has power to adopt a legislative policy, and it alone has power likewise to determine just what concrete measures in line with that policy shall be enacted.

It is not for the Government to cast about for a legislative policy and then argue that unmistakable concrete enactments in line with that policy shall be enlarged so as to make them commensurate with the real or supposed legislative policy.

In Brief for the United States, (p. 14) House Report No. 41 is quoted for the following comment on Section 6; "This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco."

As we have shown, supra, pp. 42-43, this comment applied not to the first clause of the section but to both clauses and was addressed to the then form of Section 6 in H.R. 7207, which, however, for present purposes was not vitally changed in the enacted law.

The words of Section 6 are to have the meaning which like words had in the letter of June 25, 1906, President Theodore Roosevelt to the Secretary of the Interior (R. 657-660), and in Section 6 of The Owens River Grant to Los Angeles. "In ascertaining that [the legislative] purpose, we may examine . . . the source in previous legis-

lation of the particular provision in question." (*United States v. Katz*, 271 U.S. 354, 357.)

There is no provision in the Raker Act applicable to the point in hand except the prohibition of Section 6, and we submit that it meant in 1913 what it meant in 1906—just that and no more.

The Government quotes language used while the Raker Act was under discussion in the Senate, but none of the quotations had anything to do with the meaning of or the purpose to be achieved by Section 6. These are so clear that they do not stand in need of interpretation or resort to Congressional debates. (See quotation from Brief for Plaintiff, United States, November 1, 1937, D. Ct. supra p. 5.) Moreover, these debates cannot be resorted to in the circumstances here present. (See authorities, supra, Points 7 and 8, pp. 91-96.)

If Congress had intended to impose upon the Municipality a capital expenditure for constructing a distributing system for electric energy at a cost of tens of millions of dollars it would have said so. There is no provision in the Act which justifies in the remotest degree the assumption that it was the intention or purpose of Congress to do so and there is no language appropriate to express such an imposition. Hence Section 6 cannot be interpreted so to require such an expenditure, either in direct terms or by necessary effect. It is to be noted that whenever Congress desired to impose an obligation upon the Municipality, it said so. (See House Report 41, supra, pp. 36-45.)

A requirement that San Francisco provide its own system for distribution of the Hetch Hetchy energy, would have meant that it provide a system to distribute a fraction small at the beginning and never one-half of electric energy required by the inhabitants of the municipality; the remainder of the necessary energy, and the system to distribute it, to be provided by the Company or companies then or thereafter in the field.

It will be recalled from the opinion of the Circuit Court of Appeals, supra, p. 166, that there is no provision in the Raker Act which called for the construction of a distributing system for either water or electric energy. Congress was aware that the Municipality had "arranged for an amicable condemnation proceeding to acquire the property of the Spring Valley Water Company" (supra, p. 43), but it did not impose the duty upon the Municipality to acquire the system. It left the whole subject at large to be dealt with by the Municipality in a manner best suited to its interests, limiting its prohibitions to (a) sale for resale and (b) sale or assignment of the grant, both covered in Section 6. This is true in a far greater degree in respect of electric energy. Indeed, the first four Hetch Hetchy bills introduced by Mr. Raker copied Section 6 of The Owens River grant and the prohibition applied to water only. The prohibition was enlarged by amendment of the fourth bill so introduced, to cover electric energy as explained, supra, p. 9, footnote 9.

The first portion of Section 6 was merely to guard against sales to others for resale, thereby imposing on the consumer the burden of a profit to the second owner i.e., the one making resales. Notwithstanding the Municipality's acquiescence in provisions imposing burdens upon

it (House Report 41, pp. 36-45, particularly p. 40, last paragraph, p. 43, lines 1-4, 22-25) there was no request by Congress that the Municipality should agree to acquire a distributing system nor any representation by it that it had any specific intentions which would involve a municipally owned distribution system. Congress was not concerned with the means to be employed by the Municipality to deliver municipally generated power to the inhabitants of the Municipality and made no provision respecting the same.

There is no warrant for the idea that the prohibition in Section 6 was in furtherance of a congressional policy to prevent private capital from making a profit out of the utilization of the electric energy, and it is impossible to read into Section 6 a congressional intention that distribution through an agency contract should be prohibited. Therefore, as we have already argued, there is no warrant for giving to Section 6 a broader meaning than its fair reading will allow. If, however, we should go a step farther, we would be warranted in saying that the contract in this case violates none of the policies imputed to Congress in the Brief for the United States.

The Company has no monopoly of the Hetch Hetchy energy; as agent it takes delivery for the infinitesimal period of time necessary to transmit the energy thirty-five miles to San Francisco, using its facilities to render it available to consumers, and collects the price therefor prescribed by the City in the contract, to wit, the lawful rates established by public authority in California. Under the law there can be no rates except those lawfully established.

The Company retains from the collection an amount which pays it, in addition to its operating expenses, a reasonable charge not for the utilization of the public lands granted to the City but for the utilization of its own distributing system in San Francisco, and pays the balance collected to its principal, the Municipality.

The City can terminate this relationship on one day's notice. It has the power of eminent domain. It can acquire the Company's plant by purchase or condemnation whenever its electors authorize such acquisition. It can duplicate the Company's plant with a competing system if it desires.

The Municipality has received for its energy (July 1, 1925–December 31, 1939) in excess of $30,000,000. The figure to December 31, 1937 was $26,000,000 (Vincent, R. 299), and if we add in excess of $2,000,000 per annum for two additional years, we have the figure stated. This is under a contract which the Municipality has always had the right to cancel on one day's notice.

The rates paid are those approved by the State Railroad Commission and there is no suggestion that they are unreasonable.

When the Act was passed in 1913 the Railroad Commission, with enlarged powers, had been in operation for two years only, but when the contract was made in 1925 it had been in operation for fourteen years.

In the Brief for the United States, p. 14, it is said that "it had long been the policy of the Government to preserve the national parks inviolate from private commercial exploitation". To this we say that no private or other commercial exploitation is involved. The Moccasin Power House is on privately owned property of the Municipality over seven miles from the Stanislaus National Forest and over twenty-three miles from the Yosemite National Park. The Moccasin Power House is ninety-six miles from the Company's substation at Newark. The Company's operations under the agreement do not involve any use whatever by it of public lands.

15. There is no merit in any other argument made in the Brief for the United States to establish the contention that the contract of July 1, 1925 is not a contract of agency, or (as expressed by the Government) that it is a contract constituting a grant, upon a consideration, of the right to sell.

(a) The only point ever in dispute respecting the nature of the agreement of July 1, 1925 was whether it is a contract of sale for resale or a contract of agency. There had been no suggestion before the filing of the Petition for Certiorari that it was anything other than one or the other of these two. The artificiality of the argument in the Brief to support the contention that the contract grants a right to sell, is shown by the fact that it is masked in language inappropriate to the subject dealt with.

One would be quickly understood if he said A has appointed B his agent with authority to sell.

The language of the Brief (p. 20, lines 23-26) that "for this consideration . . . the City has granted the Com-

pany a valuable contract right to sell the energy" when the fact is that the City made an agreement with the Company whereby the latter, as agent of the former, would perform the acts specified in the agreement, is far fetched, inexact and incorrect; yet it is repeated in one form or another many times. (supra p. 164.)

To say that in the agreement here involved the City "has for a consideration endowed the Company with a valuable contract right to sell the City's energy" (Brief, p. 10, lines 19-21) is a caricature of language.

(b) While the Brief so often uses the term "grant" in describing what took place under the contract of July 1, 1925, it does take account of the word "selling" in dealing with the statute, and (in order to conjure up a "sale") finds it necessary to supply a consideration for the grant, which it does, in the assumption in the agreement of an obligation by the company to furnish peak load and steam stand-by services and to pay a fixed minimum of energy each month, etc. (p. 20, lines 12-18.) Thus an agency agreement wherein the agent agrees to perform certain duties is turned into a sale of "the right to sell" and the consideration supplied by covenants of the agent in the agreement. Note may be here taken of the following sections of the California Civil Code (in force until 1931 when superseded by the Uniform Sales Act), which clearly codified the general law as it then was and now is:

> "1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."
>
> "1804. Exchange is a contract by which the parties mutually give, or agree to give, one thing for

another, neither thing, or both things, being money only."

"1806. The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and a buyer as to that which he takes."

(c) It is said (Brief, p. 17, lines 15-18) that "In granting to the Company for a consideration the right to sell the energy, the City has violated both the letter and the purpose of the Act". The City did not grant the right to sell; it gave an agent certain powers, and it did not seek to "avoid the requirements of the law" (p. 23, footnote 12) as is shown by its effort immediately after the execution of the agreement to have an authoritative ruling that the contract was one of agency and therefore not forbidden by the statute—a ruling that was not forthcoming until 1935, ten years after the execution of the agreement.

(d) The Brief for the United States (p. 22) takes the opinion of the Circuit Court of Appeals to task for invoking the rule that a sale by an agent is a sale of the principal. The Government says that the rule is a legal fiction. That it may be a legal fiction in certain instances does not detract from its operative force in this case and the rule clearly reflects the physical fact.

16. Even if the contract of July 1, 1925 were in violation of Section 6 of the Raker Act, the Government would not be entitled to the relief which it here seeks.

We come now to a consideration of what the District Court described as "secondary defenses".

(a) Section 6 is not to be considered or treated as a law of the United States passed by Congress in the exercise of its legislative powers.

The prohibitions of Section 6 are not within the law-making authority of Congress and the enactment of them, standing alone, would have been an unconstitutional invasion of the rights of the State and one of its chief political subdivisions.

In dealing with the Oregon railroad land grant, it was said in *Oregon & Cal. R. R. Co. v. United States*, 238 U. S. 393 (1915) "that this court has especially said that railroad land grants have the command and necessarily, therefore, the effect of law" (p. 415, lines 34-36), and that "it is to be remembered the acts are laws as well as grants and must be given the exactness of laws". (p. 422, lines 22-24.)

Reading this decision in the light of its facts, it is not in conflict with *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915), where it is said (p. 474) "that the land laws are not of a legislative character in the highest sense of the term (art. 4, §3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal'. Butte City Water Co. v. Baker, 196 U. S. 126".

In relying on the *Oregon* case as authority for its argument, the Government lays on one side the rule that every decision must be read in the light of the facts of the case in which it was pronounced.

The Oregon railroad grant was made in 1866.

At that time there were three transcontinental lines projected or in course of construction to the Pacific Coast, one by a northern route, one by a central and one by a southern. The construction of these transcontinental lines was a matter of great national purpose and concern. The construction of the transcontinental lines made it a matter of supreme national importance that a line paralleling the Pacific Ocean (as near as might be) from the northern to the southern boundary of the United States should be built for interconnection of and intercommunication amongst the Pacific Coast states as well as to afford connection with transcontinental lines at northern, southern and central points as we have them today.

The national purpose of the Oregon railroad land grant was recognized in *Oregon & Cal. R. R. Co. v. United States*, 238 U. S. 393 (1915); for mention is there made of "lands granted for national purposes" (p. 414, line 13) and as "part of the national purpose" (p. 416, line 25), and was "intended to continue and complete such national purpose". (p. 416, lines 35, 36.)

In the Raker Act, the purpose was local; it was important, but local; it was concerned with a municipal water supply for and the generation of electricity as a by-product by one of the leading cities of the country. Over the municipal affairs of that City, Congress had no law-making jurisdiction whatever. What it did in enacting

the Raker grant was merely to pursue the course of a good neighbor; one that might reasonably have been expected from the sovereign in dealing with one of its important municipalities. The grant to the City was upon an adequate consideration.

The provision forbidding the municipality to sell water or electric energy with the right to resell the same, could not have been enacted by Congress as a law independently of the grant and the provision is not to be here treated as a law enacted under law making power.

In respect of the disposition of the public domain, laws may be enacted totally unconnected with any particular grant, as in *Ruddy v. Rossi*, 248 U. S. 104 (1918), where the Court gave effect to an act of Congress which provided that no lands acquired as a homestead should become liable in execution for any debt of the patentee contracted prior to the issuance of the patent. (See Opinion of Mr. Justice Holmes in the case) (pp. 107-111.)

Congress may also as a party in a particular grant, introduce into the act, provisions which have the force of public law if the subject matter is within its constitutional law making power. The Oregon land grant is an instance but the Raker Act is not.

In every case where a granting statute is involved, it may become necessary to know whether provisions in the granting act are intended to be in the exercise of law making power or merely provisions inserted in a grant by the owner of the property to express the terms upon which he is willing to part with title. If it is ascertained that Congress did not intend to exercise its law making power by the insertion of a given provision in a grant of pub-

lic domain, that is the end of the question. On the other hand, if it is said that Congress did intend to exercise its legislative authority in inserting a particular provision in the grant, it becomes necessary to ascertain whether the particular provision is within the constitutional law making power of Congress.

There is nothing in the Raker Act which indicates an intention on the part of Congress to make the prohibition of Section 6, with which we are dealing, a matter of law, referable to the law making power. It is obvious that it was intended otherwise, i. e., as a provision in a grant of lands and interests in lands made by the owner of the lands to the grantee.

See Appendix hereto, p. xxvii, for the views expressed in Congress upon this point.

Senator Borah, speaking in opposition to the enactment of the Raker Act in the Senate December 5, 1913, discussed various provisions of the Act, and, among other things, said (51 Cong. Rec. 286 c. 2):

> "I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land, and I have no doubt of the proposition that the Government can attach no other conditions than an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government."

Uhl (a taxpayer) v. Badaracco, et al. (Supervisors and Mayor of San Francisco), 199 Cal. 270, 280 (1926) dealt

with the very question we are here considering, i. e., the authority of Congress as a law making power to enact the prohibitions of Section 6. The case arose after the contract here under review, i. e., that of July 1, 1925, between the City and the Company, had been in operation for more than one year; and involved the authority of the City to use the revenue collected under the contract to buy or build new power plants. The Court held that the City should apply the revenues from the Hetch Hetchy project (a) first to the payment of operating costs, and (b) the balance to the service charges on the Hetch Hetchy bond issues. The defendants (Supervisors and Mayor of the City) argued that in view of the prohibitions of Section 6 of the Raker Act the City was entitled to use the revenues from the project to build publicly owned power plants.

The Supreme Court of California held (p. 280):

> ". . . Congress has no power to create or force a public utility upon the City, and under the organic law of the City a public utility can be acquired only in one of two ways: First, from funds derived from taxes levied for that purpose; second, from funds derived from the sale of bonds issued for such purpose."

We submit that the provision cannot be supported as a law of the United States enacted under the law making power granted to Congress but must be dealt with on the basis of contract only.

(b) If Section 6 be regarded as a provision in a contract between the United States and the Municipality, it is invalid and/or unenforcible.

The general rule is that contracts between the Government and an individual are subject to the same rules of jurisprudence as contracts between individuals.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (Citing cases) (*Lynch v. United States*, 292 U. S. 571, 579.)

"The United States does business on business terms." (*United States v. Nat. Exch. Bank*, 270 U. S. 527, 534, Mr. Justice Holmes.)

"A contract between a private party and the United States for sale of goods by the one to the other is to be construed, and the rights of the parties under it determined, by the same principles as if it were between individuals." (Syl. par. 2.)

"The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. Smoot's Case, 15 Wall. 36, 47; Manufacturing Company v. United States, 17 Wall. 592, 595; United States v. Smith, 94 U. S. 214, 217." (*Reading Co. v. United States*, 268 U. S. 186, p. 188.)

"A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument." (*Hollerbach v. United States*, 233 U. S. 165, 171.)

"If [the Government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." (*Cooke v. United States*, 91 U. S. 389, 398.)

The prohibition of Section 6 considered as a provision in a contract is invalid and unenforcible because it involves an unreasonable restraint of trade and an unreasonable restriction upon the power of alienation, which is particularly true considering that the restraint is imposed upon a public use.

The Government is prosecuting this action on the basis that Section 6 falls in the category of a restrictive covenant, dealt with in *Oregon & California RR. Co. v. United States*, 238 U.S. 393, syl. par. 2, and p. 419, line 34 to p. 423, line 10.

It is an outstanding rule that a restrictive covenant is contrary to public policy and void, if its enforcement will not benefit and if its breach will not damage the covenantee.

> "Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable." (Tindal, C. J., in *Horner v. Graves*, 7 Bing. 735, 743, 131 Eng. Rep. 284, 287, middle [1831].)

The rule, thus stated in 1831, was adopted by this Court sixty-seven years ago in *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1873).

See, also, *Los Angeles University v. Swarth*, 107 Fed. 798, 803; 5 *Williston on Contracts, Revised Edition* (1937), pp. 4553-4699, particularly Section 1636, p. 4580; *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396; *East Jersey Water Co. v. Newark*, 96 N.J.Eq. 231, 98 N.J.Eq. 672; *Los Angeles Investment Co. v. Gary*, 181 Cal. 680; *Wayt v. Patee*, 205 Cal. 46.

(c) The City had no power to enter into a contract with the Government or with anyone else, limiting its freedom in trading in its electric energy, and the Government had notice of the limitation upon the City's power when the contract with it was made.

The City has only such powers as are conferred upon it by its Charter. Generally, it acts through its Board of Supervisors, which constitutes the legislative department of the municipality. The authority of the Board of Supervisors when the Raker Act was passed will be found in Article II of the then Charter. Article VI, Chapter I, Sec. 9, par. 8, read as follows:

> "Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors:
>
> . . . . . .
>
> 8. Of any and all public utilities owned, controlled or operated by the City and County, or which may hereafter be so owned, controlled or operated."

(d) If the prohibitions of Section 6 be held invalid or unenforcible, that fact will have no effect upon the grant.

The provisions of Section 6 are severable and divisible from the remaining provisions of the Raker Act. It follows, then, that the invalidity or unenforcibility of the prohibitions of the provisions of Section 6 would not effect any of the rights granted to the City by the Raker Act. This is in accordance with the universally appli[illegible] rule.

(e) The prohibitions of Section 6 of the Raker Act were not inserted for the benefit of the General Govern-

ment but because the General Government conceived they would benefit the City. What was intended as a shield for, should not in a court of equity be permitted to be turned into a sword against, the City. (*United States v. Farrar*, 38 F.2d 515, 517, c. 2; *Robbins v. Pacific Eastern Corporation*, 8 C.2d 241, syl. par. 18.)

(f) A number of equitable rules also lead to the conclusion that no relief should be granted to the Government herein.

(1) The rule that grants by the Government are, in particular circumstances, construed strictly against the grantee and in favor of the grantor has no application to this case, because the rule applies to gratuitous grants and the grant made by the Raker Act was not gratuitous, but was made for a valuable consideration.

(2) Equity never permits an injunction to be issued to enjoin the alleged violation of a contract provision where (as in the present case) no benefit can accrue from its enforcement to the person seeking to enforce it, and no damage or injury will result to him from its breach.

(3) Injunction will be denied if the Court finds that greater damage or hardship will be caused to the defendant by the granting of an injunction, than will be caused to the plaintiff by the denial of an injunction.

Harrisonville v. Dickey Clay Co., 289 U. S. 334, 337 ft. 338, with marginal notes; *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 71 ft. 72; *Mountain Copper Co. v. United States* (C.C.A. 9), 142 Fed. 625; *Bliss v. Washoe Copper Co*, (C.C.A. 9), 186 Fed. 789; and *McCarthy v. Bunker Hill, Etc. Co.* (C.C.A. 9), 164 Fed. 927.

(4) Although the equitable rule which requires a Court to "balance the equities" of the parties and consider the hardship that will result from the granting or the denial of an injunction was once applied to preliminary injunctions only, and, although there is a division among present day authorities as to whether or not it should be applied to final injunctions, the weight of modern authority applies the rule to final injunctions, as well as to preliminary injunctions. *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334, 337 ft.-338, with marginal notes; *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 71 ft.-72.

See cases cited in paragraph (3) supra.

(5) The United States, as a litigant, is bound by the same equitable rules and principles as a private litigant.

(6) Equity does not permit an injunction to be granted except to protect actual or prospective rights in real property or in unique personal property, and (respecting the former class of property), only when the act complained of is in violation of a covenant which concerns an estate or interest in the property. Equity will not interfere to enforce or protect contract rights which are collateral to a grant, but, for the vindication of such rights, will remit the plaintiff to an action at law for damages, which is the recognized remedy for their protection.

(7) It is a general rule of equity that the violation of a naked legal right will not be enjoined, unless the party applying for the injunction will suffer substantial damages if an injunction is denied.

(8) Equity will not permit an injunction to be issued where (as in this case) to do so would prejudice public interests.

It is evident that if the City is forbidden to dispose of the electric energy through an agent it cannot dispose of it at all because it has no distribution system of its own. Under these circumstances the enforcement of the injunction would deprive the City of an income exceeding $2,200,000 per year from the electric energy, and thus greatly prejudice its interest and the interest of its taxpayers, and, in addition, cause the economic waste of electric energy of that great value.

(9) Equity will not decree specific performance of a contract (or conversely enjoin the breach of a contract) where performance of the contract (as construed by the plaintiff) is impossible, or where (as in the present case) performance requires the consent of persons (i.e., the electors of San Francisco) who are not parties to the contract.

If, as argued by the Government, distribution of the electric energy cannot be made through an agent it cannot be made at all, because the City lacks its own distribution system, and cannot acquire one without the consent of its electors who have many times refused to give that consent. It follows, then, that performance of the provisions of Section 6 of the Raker Act (as construed by the United States) is impossible, and, further, that it cannot be made possible without the consent of the electors of San Francisco who are not parties to the contract (i.e., the Raker Act).

17. The District Court erred in sundry instances in rejecting evidence offered by the Municipality.

There are 114 Assignments of Error in the record.

These may be classified as follows:

Assignments Nos. 1 to 7, inclusive (R. 527-532), are based upon the admission in evidence, over objection of the municipality, of documentary evidence, offered by the Government.

Assignments Nos. 8 to 32, inclusive (R. 532-557), are based upon the exclusion of evidence, oral and documentary, offered by the municipality and objected to by the Government.

Assignment No. 33 (R. 557) is based upon the striking out of certain evidence, oral and documentary, offered by the municipality and, theretofore, admitted.

The remaining Assignments, i. e., Assignments Nos. 34 to 114, inclusive (R. 567-623), are, in most part, based upon exceptions to (1) the refusal of the Court to make findings requested by the municipality, (2) the Conclusions and Findings made by the Court and (3) the Decree.

We do not press the first seven Assignments which, as stated, are based upon the admission of evidence as the evidence is in the record.

Assignments Nos. 9 and 10 (R. 533-534) are based upon rulings sustaining objections to questions put to John J. Dailey, in 1925 Assistant City Attorney of San Francisco who drafted the contract of July 1, 1925 (R. 534), respecting (1) a conversation he had in June, 1925, with Mr. John H. Edwards, who rendered the Opinion

of June 8, 1923 and who in 1925 was then either Assistant Secretary or Solicitor of the Department of the Interior, and (2) whether, in drafting the contract of July 1, 1925, he relied upon the suggestion in Mr. Edwards' Opinion respecting distribution of energy through an agent.

These two assignments are not of great importance because we understand the Government concedes that the parties to the contract of July 1, 1925, intended and attempted to make an agency contract; and if the Government does not so concede, the fact is overwhelmingly proved and is not debatable.

Assignment No. 11 (R. 535) is based upon a ruling of the Court, sustaining an objection by the Government to an opinion of Mr. C. Edward Wright, Solicitor of the Department of the Interior, dated July 20, 1925.

Mr. Wright's opinion is referred to in the opinion of Secretary Ickes (R. 234-235) which was admitted in evidence over objection by the municipality. We submit that the reference to Mr. Wright's opinion in Secretary Ickes's opinion made Mr. Wright's opinion admissible, even if it were not, otherwise, admissible.

Assignments Nos. 12 and 13 (R. 536-537) are based upon rulings sustaining objections by the Government to Defendant's Exhibits G and H for identification (R. 536-537), which are, respectively, (1) a statement of the Registrar of Voters of San Francisco showing seven proposed bond issues for electric distribution systems that had been voted on and rejected by the electors of the municipality, and (2) a statement showing (a) the amount of the assessment roll of the municipality; (b) the constitutional debt limitation of the municipality, and (c)

related matter. These exhibits were offered in support of the defense that limitations imposed upon the municipality by the Constitution of California and by its own charter, made it legally impossible for the municipality to acquire a municipal system for the transmission and distribution of the Hetch Hetchy energy without the approval of its electors, who had, seven times, refused to give their approval. We submit that the evidence should have been received.

Assignments Nos. 14, 15 and 16 (R. 538-540) are based upon rulings which excluded Defendant's Exhibits I, J and K for identification, the first two of which were resolutions of the Board of Supervisors of the municipality. If, as we claim, it was legally impossible for the municipality to comply with Section 6, as construed by the Government, injunctive relief should have been denied because the granting of such relief was tantamount to requiring the Municipality to accomplish the impossible or lose a large part of the return from its investment. By the resolutions, the municipality solicited offers by municipalities and municipal Water Districts and Irrigation Districts for the purchase of the whole or part of the Hetch Hetchy energy, and requested from the power companies in San Francisco the terms upon which they would distribute the Hetch Hetchy electric energy under an agency contract for a period not exceeding ten years, or would sell (for cash or upon terms) such portions of their respective distribution systems as were adapted to the distribution of the Hetch Hetchy energy by the municipality, etc. Exhibit K was made up of the negative replies of the power companies to the questions put to them.

The two resolutions were offered to prove (1) compliance with Sec. 9(1) of the Raker Act which gave municipalities and municipal Water Districts and Irrigation Districts the right to purchase Hetch Hetchy energy not required by San Francisco for its own use, and (2) compliance with the provisions of San Francisco's charter which required it to take the steps mentioned, as a condition precedent to the acquisition of a municipally owned system for the distribution of the Hetch Hetchy energy. Furthermore, the evidence supported the Municipality's defense that it was legally impossible to comply with Section 6 of the Raker Act, as construed by the Government.

We submit that the three exhibits were admissible and that the Court erred in excluding them.

Assignment No. 17 (R. 540) is based upon a ruling which excluded a resolution of the Board of Supervisors declaring that it would be the policy of the municipality to furnish such standby electric service and electric energy (within limitations) as might be required by Modesto Irrigation District.

The resolution was adopted in response to a request from Modesto Irrigation District for a declaration of policy such as was made in the Resolution; as shown by its context, the resolution recognized the rights accorded the Irrigation District under Section 9 (l and m) of the Raker Act. We submit, that the exhibit should have been received.

Assignments Nos. 18 and 19 (R. 541-544) are based upon an effort of the municipality to prove that the Hetch Hetchy energy delivered under the contract of July 1,

1925, is less than the total demand of San Francisco consumers, and that if it were subtracted from the total amount of energy used in San Francisco, from all sources, the amount of electric power in Northern California would be shortened and the supply necessary for consumers would be endangered and make necessary the construction of additional power plants.

The matters so sought to be shown were abundantly shown, elsewhere, and cannot, now, be said to be a matter of dispute. For this reason, we pass these assignments. Although we desire to point out that the evidence to which the Assignments refer had cogent force in making applicable the general equitable rules upon which the Municipality relied to support its claim that in the circumstances of the case, it would be an abuse of discretion to grant injunctive relief.

Assignments Nos. 21 and 22 (R. 544-546) are based upon rulings which rejected evidence that it would cost the municipality $60,000,000 to acquire a transmission line from Newark to San Francisco and distribution and standby systems.

This evidence was offered in support of the municipality's defense that it was and had been legally impossible for it (in view of Constitutional and Charter limitations upon its debt-incurring capacity), to acquire a municipal transmission line and distribution and accessory systems. We submit that the Court erred in rejecting the evidence.

Assignments Nos. 23 and 24 (R. 546-549) are based upon rulings which rejected evidence that at the time of the enactment of the Raker Act and for many years prior thereto, it had been the plan of the Municipality to

pump the Hetch Hetchy water over the Coast Range Mountains, and, in so doing, to utilize the greater part of the electric energy that might be developed in the Hetch Hetchy project and that not until some three years after the enactment of the Raker Act, was it ascertained that it would be possible and practical to tunnel the Coast Range Mountains and bring the Hetch Hetchy water into San Francisco by gravity flow, thereby making available for disposition a greater amount of electric energy than would have been available, if the original plan of utilizing the energy for pumping had been carried out.

This evidence was offered to show that it was never intended by Section 6 of the Raker Act to require direct municipal distribution of Hetch Hetchy energy because, at the time of the enactment of the Raker Act, the amount of Hetch Hetchy energy, which it was then believed would be available for use by San Francisco consumers was so small that it never could have been "intended" to force the municipality to acquire its own transmission line and distribution system, for the distribution of the small amount of energy.

Assignment No. 25 (R. 549) is based upon a ruling sustaining an objection by the Government to a question put to N. Randall Ellis, a witness for the municipality.

We submit that the question was a proper one and that the ruling of the trial Court in sustaining the objection thereto was erroneous. If this be true, the answer of the witness should be allowed to stand. A question was put to Mr. Ellis whether, in his opinion, the allowance to the Company under the contract "represented the actual expense" of the Company in distributing the electric energy,

"including a reasonable return on the capital required for that purpose", and he answered "Yes". An objection was then made to the question and was sustained, but no motion was made to strike the answer. We claim that, in the absence of a motion to strike the answer, it is evidence in the case. Moreover, the answer did no more than sum up previous testimony (R. 435) given by Mr. Ellis without objection. We claim that the question to which the objection was sustained, was pertinent, and, in any event, the ruling of the Court in sustaining the objection is here for review. (106 F. (2d) 572, col. 2, lines 47-49.) The evidence was important, because it demonstrated that no profit is being made by the Company out of the Government's grant considering that the service which the Company renders returns to it only the bare cost of the service and a reasonable return on the capital used in rendering it.

Assignments Nos. 26 and 27 (R. 550-553) are based upon the sustaining of objections by the Government to two decisions of the Railroad Commission of California in valuation proceedings brought by the municipality in respect of the properties of the Great Western Power Company and Pacific Gas & Electric Company, in which the Railroad Commission fixed the value of the Great Western properties at $11,815,000.00, and of the Pacific Gas and Electric properties at $26,880,000.00.

These decisions were offered to show action taken by the municipality (as required by its charter), to acquire the transmission, distribution and standby systems of the one and/or the other of the two companies mentioned, in order that the municipality might have a municipally owned transmission and distribution system wherewith to distribute the Hetch Hetchy energy and in connection

therewith counsel for the municipality offered to prove that bond issue propositions for the acquisition of the properties of the respective power companies had been submitted to the electors in the year 1930 and had been defeated.

The rejected evidence had to do with the municipality's defense of legal impossibility of performance and with the defenses based upon rules of equity which require the denial of injunctive relief, in circumstances such as shown in this case. We submit that it should have been received, and that the ruling of the Court, which excluded it, is erroneous.

Assignments Nos. 28 and 29 (R. 553-555) are based upon the rejection of evidence showing the amount of bonds authorized and sold by the municipality for governmental purposes between the fiscal year 1924-1925, and the year 1927; the changes in San Francisco's bonding capacity resulting from the issuance of said bonds, and its resultant legal inability to issue general obligation bonds in an amount sufficient to cover the cost of a municipally owned distribution system, in view of Constitutional and Charter debt limitations and related matters.

This evidence was offered in support of the municipality's defense of legal impossibility to acquire a municipally owned transmission and distribution system. We submit that it was proper and should have been received.

Assignments Nos. 30 to 32, inclusive, (R. 555-557) are based upon the rejection of evidence to show that all of San Francisco's water rights were acquired under California laws, and that none of them was acquired from the Government under the Raker Act or otherwise and, con-

sequently, the utilization and generation of such water rights for the generation of electric energy is not subject to the control of Congress.

We do not dwell upon the Court's error in rejecting this evidence because the Government does not contend that the municipality acquired any water rights through the Raker Act. In fact, the Raker Act contains no grant of water rights. On the contrary, Section 11 of the Act, in terms, recognizes that the municipality's water rights must be acquired in accordance with the laws of California. Moreover, House Report 41 (supra, p. 38) and Congressional discussions (appendix p. xxvii) make it clear that San Francisco's water rights were acquired under the laws of California.

Assignment No. 33 (R. 557) is based upon the striking out of evidence previously received and having to do with (1) the value of the property received by the municipality from the Government and that conveyed by the municipality to the Government, and the cost of constructing trails, roads, etc., as required by the Raker Act; (2) a letter of Secretary Work to the Municipality dated May 18, 1928, (R. 327) which apparently approved (R. 333) the contract of July 1, 1925; (3) the amount of bonds issued for the Hetch Hetchy project as of July 1, 1925, and the bond limit of San Francisco for future debt as of said date (R. 369-372); and (4) the fact (R. 388) that loss of the amounts received by the municipality under the contract of July 1, 1925, would require an increase of $.28 per $100.00 in the municipal tax rate.

We submit that the evidence so stricken out was relevant to show, first, that the grant made by the Raker Act was upon a valuable consideration; second, acquiescence by the Interior Department in the contract of July 1, 1925; and third, the great detriment to the municipality (without any benefit to the Government) that would result from enjoining distribution under the contract of July 1, 1925. It follows, then (so we submit) that the ruling which struck out the evidence was erroneous.

Nearly all of the foregoing Assignments of Error, based upon the refusal to admit or the striking out of evidence, offered by the Municipality, had a direct bearing upon the contention of the Municipality that equitable rules required a denial of injunctive relief in the case, inasmuch as the alleged violation of the Raker Act, of which the Government complains, has to do not with a condition attached to the right granted but only to a collateral covenant in the grant.

The remaining Assignments, i.e., Nos. 34 to 114, inclusive, (R. 567-623) are based upon (1) the denial of certain motions of the municipality; (2) the refusal of the Court to make findings as requested by the municipality; (3) exceptions to the findings and conclusions made by the Court, and (4) exceptions to the Decree.

The exceptions to the findings and the decree and the refusal of the Court to make findings requested by the municipality, involve the construction of Section 6 of the Raker Act or the contract of July 1, 1925, and, in one form or another, have already been discussed.

18. **Conclusion.** It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

JOHN J. O'TOOLE,
City Attorney of Respondent;

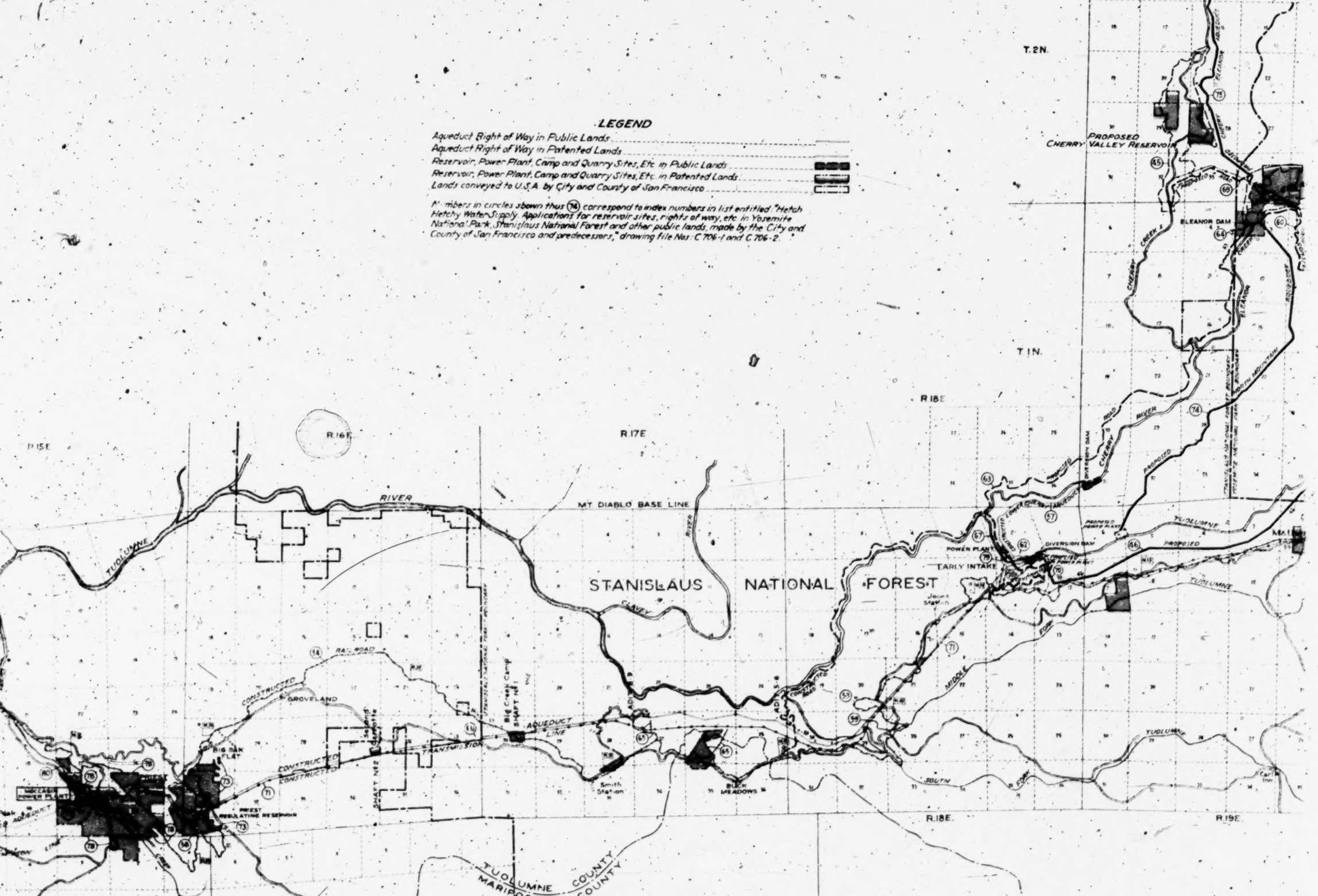
DION R. HOLM,
Assistant City Attorney of Respondent;

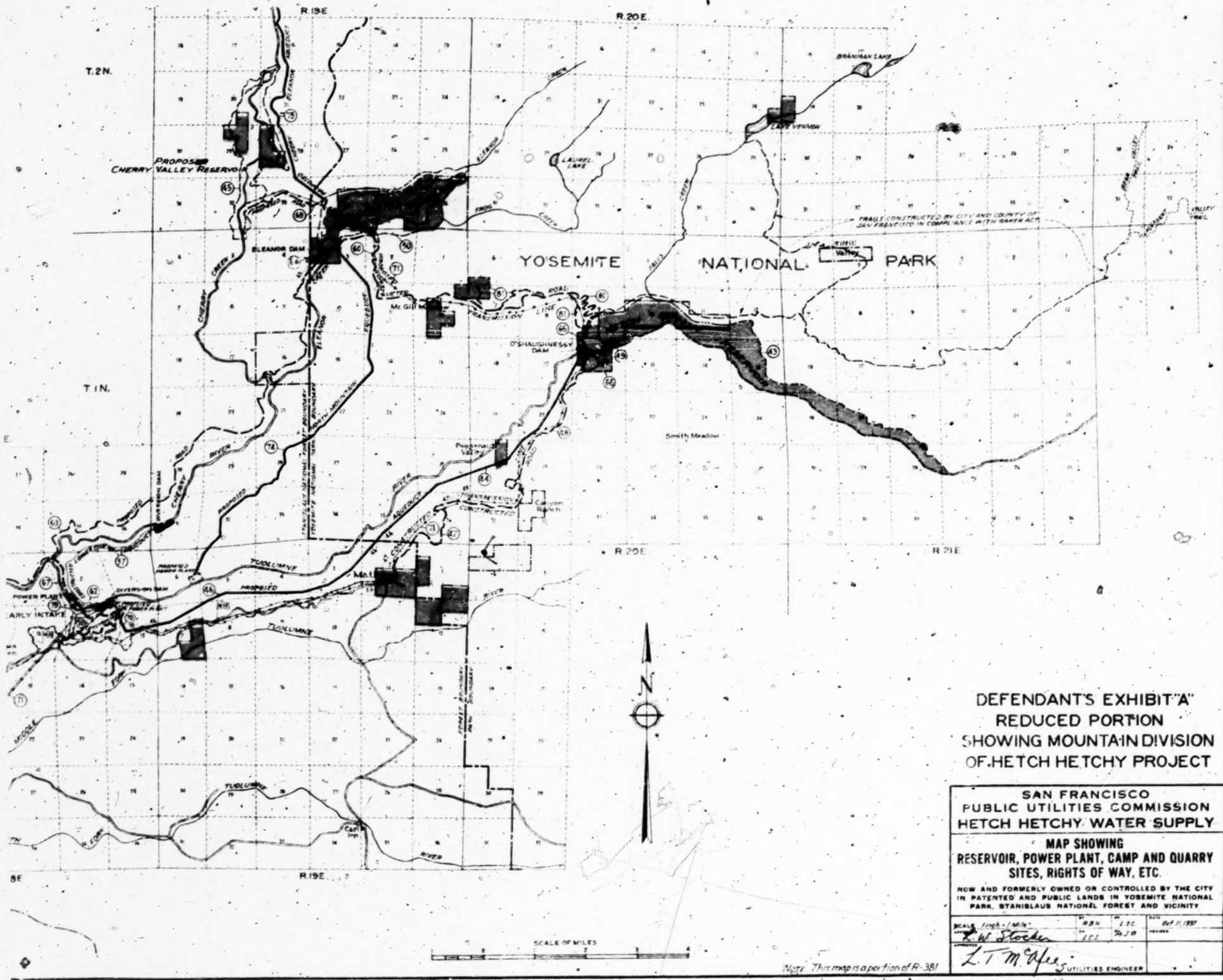
ROBERT M. SEARLS,
Special Counsel of Respondent;

GARRET W. MCENERNEY,
Counsel for Respondent.

San Francisco, March 15, 1940.

[Map Follows]


LEGEND
Aqueduct Right of Way in Public Lands
Aqueduct Right of Way in Patented Lands
Reservoir, Power Plant, Camp and Quarry Sites, Etc. in Public Lands
Reservoir, Power Plant, Camp and Quarry Sites, Etc. in Patented Lands
Lands conveyed to U.S.A. by City and County of San Francisco
Numbers in circles shown thus (74) correspond to index numbers in list entitled "Hetch Hetchy Water Supply. Applications for reservoir sites, rights of way, etc. in Yosemite National Park, Stanislaus National Forest and other public lands, made by the City and County of San Francisco and predecessors," drawing file Nos. C 706-1 and C 706-2.
T.2N.
T.1N.
R.15E
R.16E
R.17E
R.18E
R.19E
MT DIABLO BASE LINE
STANISLAUS NATIONAL FOREST
PROPOSED CHERRY VALLEY RESERVOIR
ELEANOR DAM
CHERRY CREEK
ELEANOR CREEK
TUOLUMNE RIVER
PROPOSED DIVERSION DAM
POWER PLANT
EARLY INTAKE
PROPOSED POWER PLANT
RAILROAD
CONSTRUCTED
GROVELAND
BIG OAK FLAT
FOREST REGULATING RESERVOIR
AQUEDUCT LINE
TRANSMISSION
BIG CREEK CAMP
SHAFT No 1
SHAFT No 2
Smith Station
BUCK MEADOWS
MIDDLE FORK
SOUTH FORK
TUOLUMNE COUNTY
MARIPOSA COUNTY



DEFENDANT'S EXHIBIT "A"
REDUCED PORTION
SHOWING MOUNTAIN DIVISION
OF HETCH HETCHY PROJECT

SAN FRANCISCO
PUBLIC UTILITIES COMMISSION
HETCH HETCHY WATER SUPPLY

MAP SHOWING
RESERVOIR, POWER PLANT, CAMP AND QUARRY SITES, RIGHTS OF WAY, ETC.

NOW AND FORMERLY OWNED OR CONTROLLED BY THE CITY IN PATENTED AND PUBLIC LANDS IN YOSEMITE NATIONAL PARK, STANISLAUS NATIONAL FOREST AND VICINITY

SCALE 1 inch = 1 Mile	RBH	LJC	Oct 11, 1937
L. W. Stocker	LCL	HJB	
L. T. McAfee, UTILITIES ENGINEER			

FILE COPY

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MAR 21
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

APPENDIX TO BRIEF FOR RESPONDENT.

JOHN J. O'TOOLE,
City Attorney of Respondent;
DION R. HOLM,
Assistant City Attorney of Respondent;
ROBERT M. SEARLS,
Special Counsel of Respondent;
GARRET W. McENERNEY,
Counsel for Respondent.

BRENAN-WALSH PRINTING CO. SAN FRANCISCO

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In the Supreme Court of the United States

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CITY AND COUNTY OF SAN FRANCISCO,
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APPENDIX TO BRIEF FOR RESPONDENT.

Appendix

Contract, July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company for the distribution of municipal electric energy.

(U. S. Exhibit 6—R. 223; 76-90).

THIS AGREEMENT, Made and entered into this first day of July, 1925, by and between the Board of Public Works of the City and County of San Francisco, acting for and on behalf of the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, hereinafter referred to as "City", under authority of the Board of Supervisors granted by Ordinance No. 6684 (New Series), the party of the first part, and PACIFIC GAS AND ELECTRIC COMPANY, a corporation, of San Francisco, California, hereinafter referred to as "Company", the party of the second part;

WITNESSETH:

WHEREAS, the City has now completed the construction of the Moccasin power plant as a part of the development of the Hetch Hetchy Project, which plant has a rated capacity of 70,000 kilowatts and is capable of producing approximately 460,000,000 kilowatt hours of electric energy annually, and has also completed the building of a transmission line to the vicinity of Newark in Alameda County of sufficient capacity to transmit and deliver to that point approximately 420,000,000 kilowatt hours after allowance for transmission losses; and

WHEREAS, the City has not yet constructed or acquired a transmission line from the point near Newark to the City limits, and has not yet constructed or acquired a distribution system for utilizing the power produced at Moccasin plant and delivering the same for general municipal uses and for sale to consumers of electric energy within the limits of the City and County; and

WHEREAS, pursuant to resolutions of its Board of Supervisors looking to the acquisition of a municipally owned, electric distribution system, the City has commenced and there is now pending before the Railroad Commission of the State of California, proceedings for the determination by the Commission of the compensation to be paid by the City for the local distribution systems and certain steam plants now owned and operated by the Pacific Gas and Electric Company and the Great Western Power Company of California, respectively, when the same shall be taken over by the City under eminent domain proceedings, or otherwise; and

WHEREAS, the City has not funds available at the present time with which to purchase or construct a distribution system of its own and it will be necessary to submit a proposition to the People to vote bonds to provide money for that purpose, before a distribution system can be purchased or constructed, and the City cannot well determine whether to purchase one or both of the local distribution systems, or to construct a distribution system of its own until the Railroad Commission determines the amount of compensation to be paid by the City for the taking of either or both of said local distribution systems under the proceeding now pending before the Commission; and

WHEREAS, the City intends to complete its power transmission line from Newark to San Francisco and to acquire or construct a distribution system of its own; and

WHEREAS, the said Moccasin Power Plant is now in condition to operate at its full capacity of 70,000 kilowatts and unless some temporary arrangement is made between the City and the Company for the distribution to consumers of the electric energy which can be produced at said plant during the period that must elapse before the City can acquire, own and operate a distribution system of its own, there will be a great waste of said potential energy and a great loss of potential revenue to the City and its taxpayers; and

WHEREAS, the statistical and financial records kept by the City or the Company show the following, viz.:

1. That the total capacity and possible annual output of energy from the Moccasin plant will not be sufficient to supply all municipal requirements and the demand of consumers in the City and County for electric power and energy although in hours and days of low energy requirement the capacity and output may be more than sufficient to supply said requirements and demands during said hours and days.

2. That the average transmission and distribution losses of energy from the Newark substation of the Company to the various consumers' meters in San Francisco is 24 per cent of all energy delivered into the system of the Company at Newark for transmission and distribution to consumers in San Francisco.

3. That 2.383 cents is the average revenue per kilowatt hour received from all classes of consumers of the Com-

pany in San Francisco under existing rates based on the experience of the Company for the year 1924.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained, the parties hereto mutually covenant and agree as follows:

FIRST: The City hereby employs the Company and the Company accepts employment as temporary distributor for and in behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines. The City agrees to so maintain its Moccasin plant that it will, whenever necessary to do so, carry load up to its full capacity of 70,000 kilowatts, subject to limitations of its forebay storage and to accidents and unforeseen contingencies; and to deliver and consign the entire energy output of its said plant to the Company, save and except such portion thereof as may be reserved for City requirements as hereinafter provided. The Company agrees to accept such consignment of the entire energy output of Moccasin plant, less transmission losses and except such portion as the City shall retain as above and hereinafter mentioned delivered at not to exceed a 75 per cent monthly load factor, to make at its own expense the necessary physical connection of the City's transmission lines with its own system at Newark; to instal all necessary equipment, facilities and proper meters for accurately measuring the amount of energy delivered; to transmit so much of said energy through its own system to San Francisco as may be required to light public streets and to meet other municipal needs for electric energy; to supply street railroads and other consumers of such energy in the City; to trans-

form, convert, regulate, distribute and meter the energy sold; to furnish all necessary peak load and steam standby service and collect from consumers of such energy the charges therefor which shall not exceed the lawfully established rates, and make accounting to the City as hereinafter in Paragraph Fifth provided.

SECOND: The City agrees that the energy consigned to the Company from the Moccasin Plant shall be the entire output thereof, diminished only by transmission and other losses and by such amounts as the City shall require for its own use in the construction or operation of any portion of the Hetch Hetchy Project, and also by such amounts, if any, as the City may be legally required to furnish to irrigation districts or municipalities under the terms of the act of Congress, approved December 19, 1913, known as the Raker Act. Failure or inability of the Company to take at Newark a part of the energy which the City is in a position to deliver to it under the terms of this agreement shall not constitute grounds for deduction in the amount of the revenue to be paid to the City had such energy been received by the Company and sold to consumers, it being understood, however, that the Company is not required to accept the output of the Moccasin plant at a monthly load factor in excess of 75 per cent.

THIRD: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that of the energy consigned and delivered to the Company

at Newark and by the Company delivered to consumers in the City and County of San Francisco there would be transmission, substation and distribution losses amounting to 24 per cent of the energy thus consigned and delivered at Newark and therefore 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers.

FOURTH: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that inasmuch as in the year 1924 under existing rates the average revenue received by the Company from consumers in San Francisco amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy to be consigned and delivered by the City to the Company at Newark for the purposes in this contract declared.

FIFTH: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned and delivered by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that the City shall receive for the energy consigned and delivered by it to the Company at Newark 26.935 per cent of 2.383 cents per kilowatt hour for 76

per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof.

It is agreed by the City and the Company that the Company shall account for and pay over to the City for the energy so consigned and delivered to it by the City of Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered by the City to it at Newark, and the Company shall retain the aforementioned 73.065 per cent as its compensation for services rendered under this contract.

SIXTH: The City shall not be obliged to deliver energy into the system of the Company at Newark, nor shall the Company be obligated to receive such energy at such time as either shall be prevented from doing so on account of accidents, acts of God or fire, making it physically impossible to so deliver or receive energy or on account of strikes, riots, war, or any other cause beyond reasonable power of control of either party. In the event of inability on the part of the City to deliver the said energy at Newark, or inability on the part of the Company to receive the energy at Newark, arising from any of the causes in this paragraph specified, the party so prevented from making such delivery of energy or receiving such energy shall proceed at all possible speed to take the necessary action to enable it to comply with its covenants herein contained.

SEVENTH: The net proceeds due the City, namely 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent

of the energy so consigned and delivered at Newark by it to the Company, shall be paid into the Treasury of the City and County of San Francisco by the Company in monthly installments and not later than the 15th day of each month after operation under this agreement commences. The amount of such payment shall be based upon the amount of energy actually delivered into the system of the Company at Newark during the preceding month. In the event of the refusal, failure or inability of the Company to take the available output of the Moccasin plant deliverable at Newark in accordance with the terms of this agreement, then the amount of energy which the City could have delivered shall be the basis of computing such monthly payment. The method for determining this amount shall be covered in the memorandum of technical specifications, details and conditions hereinafter provided for.

EIGHTH: Should the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority, then the amount to be retained by the Company and the amount to be paid to the City under the terms of this agreement shall be proportionately increased or decreased.

NINTH: Neither this contract nor anything contained herein, nor the prices, rates or charges fixed herein, shall ever be offered or in any manner used as evidence by either said City and County or said Company or any successor in interest of either of them in any court or before any commission or official of the State of California or of the United States of America in any action or proceeding in which said City or any successor in interest shall be a

party adversary to said Company, or any successor in interest, other than an action or proceeding between the parties hereto, or their respective successors in interest, or one of said parties and a successor in interest of the other, commenced and prosecuted for the purpose of obtaining a judicial or official interpretation or determination of the legality of this contract or of any provision thereof or for the purpose of enforcing its performance, or recovering damages for its non-performance.

TENTH: It is expressly recognized that this contract is a temporary arrangement between the parties for distributing the energy output of the Moccasin plant over and through the Company's lines and system during the period that must elapse before the City can construct or acquire a distribution system of its own.

It is therefore agreed that the contract may be terminated at any time by either the City or the Company upon one day's previous notice in writing to the other.

ELEVENTH: It is further understood and agreed that this contract is subject to immediate cancellation upon request or demand of the Secretary of the Interior of the United States should he hold that in his opinion the agreement violates any provisions of the laws of the United States in general, or the Raker Act in particular.

TWELFTH: All of the electric energy to be delivered and received pursuant to the provisions of this contract shall be three phase, 60 cycle, alternating current. The electromotive force of such energy at the point of delivery shall be approximately 105,000 volts, slight variation in voltage and frequency to be permitted.

THIRTEENTH: The Company shall inspect, test and keep in proper repair all meters and accessories at Newark which will be used for measuring the amount of electric energy consigned to the Company under this contract. The said meters shall be kept under joint seals of the City and Company which shall not be broken except in the presence of authorized representatives of both parties. Either party shall have the right at any time to request an inspection or test, and if found necessary, proper adjustment of such meters in the presence of a representative of the other party appointed for that purpose. When such inspection or test is desired, sufficient notice shall be given by the party desiring the test, to permit of the other party having its representative present. The registration of the meters shall be used as the basis of determining the amount of energy consigned hereunder, unless, upon being tested, the meters shall be found to register inaccurately and such inaccuracy shall exceed two per cent (2%). Where the inaccuracy is more than two per cent (2%), but the actual inaccuracy can be approximately determined, the readings of such meters shall be corrected and such corrected reading shall be used as a basis for determining the amount of energy delivered. Where the registry of the meters cannot be so properly corrected, the amount of energy delivered during such period of inaccurate registry shall be estimated by the engineers for the parties hereto from the average daily plant output of energy during such period, and from any other available and pertinent data.

FOURTEENTH: Technical specifications, details and conditions as to the construction of the interconnecting lines

and switching apparatus at Newark, and as to the maintenance, repair and operation of the power generating plant and transmission system of the City shall be agreed upon by the City Engineer of San Francisco and the Vice President in charge of electrical construction and operation of the Company, and a memorandum of such agreed specifications and operating details shall be filed with and become part of this agreement; provided, that if any changes in said technical specifications or operating details may from time to time become necessary or advisable in the opinion of both of said parties, supplemental memoranda of the same shall be filed, and become part hereof without affecting the remaining terms of the agreement.

FIFTEENTH: The recitals hereinabove contained commencing with the words "Whereas, the City has now completed the construction of the Moccasin Power Plant", and ending with the words "a great loss of potential revenue to the City and its taxpayers; and" are statements made by the City of its purposes and intentions and concerning other matters contained in said recitals. Said recitals are not and no one of them is made by or on behalf of the Company. None of said recitals shall be binding on either of the parties to this agreement in any dispute, controversy or question which may ever hereafter arise in which the same might otherwise be relevant or pertinent.

IN WITNESS WHEREOF, the Board of Public Works has caused these presents to be duly executed and signed by its Members, and the Company has caused these presents to be executed by its officers first thereunto duly author-

ized by resolution of its Board of Directors, a copy of which is hereunto annexed, the day and year first above written.

BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO,
By T. A. Reardon,
By D. G. Fraser,
By C. E. Stanton,
Its Members.

ATTEST:
S. J. Hester,
(Seal) Acting Secretary.

PACIFIC GAS AND ELECTRIC COMPANY,
(a corporation),
By F. A. Leach, Jr.,
Vice President and General Manager.

ATTEST:
D. H. Foote,
(Seal) Secretary.

Contract Provisions in re Consignment.

("Throughout this contract the language of consignment is used"—Opinion of Secretary Ickes, August 24, 1935, R. 247:21.)

"First: The City hereby employs the Company and the Company accepts employment as temporary distributor for and in behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines. The City agrees . . . to deliver and consign the

entire energy output of its said plant to the Company. . . . The Company agrees to accept such consignment, . . . to transmit so much of said energy through its own system to San Francisco as may be required to light public streets and to meet other municipal needs for electric energy; to supply street railroads, and other consumers of such energy in the City; . . . collect from consumers of such energy the charges therefor . . . and make accounting to the City. . . ."

"Second: The City agrees that the energy consigned to the Company from the Moccasin Plant shall be the entire output thereof. . . ."

"Third: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that of the energy consigned and delivered to the Company at Newark and by the Company delivered to consumers in the City and County of San Francisco there would be transmission, substation and distribution losses amounting to 24 per cent of the energy thus consigned and delivered at Newark and therefore 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers."

"Fourth: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the

terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that inasmuch as in the year 1924 under existing rates the average revenue received by the Company from consumers in San Francisco amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy to be consigned and delivered by the City to the Company at Newark for the purposes in this contract declared."

"Fifth: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned and delivered by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that the City shall receive for the energy consigned and delivered by it to the Company at Newark 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof."

"It is agreed by the City and the Company that the Company shall account for and pay over to the City for the energy so consigned and delivered to it by the City at Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered by the City to it at Newark, and the Company shall retain the aforementioned 73.065 per

cent as its compensation for services rendered under this contract."

"Seventh: The net proceeds due the City, namely, 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark by it to the Company, shall be paid into the Treasury of the City and County of San Francisco by the Company in monthly installments and not later than the 15th day of each month after operation under this agreement commences. . . ."

"Tenth: It is expressly recognized that this contract is a temporary arrangement between the parties for distributing the energy output of the Moccasin plant over and through the Company's lines and system during the period that must elapse before the City can construct or acquire a distribution system of its own.

It is therefore agreed that the contract may be terminated at any time by either the City or the Company upon one day's previous notice in writing to the other."

"Thirteenth: The Company shall inspect, test and keep in proper repair all meters and accessories at Newark which will be used for measuring the amount of electric energy consigned to the Company under this contract. . . ."

Interpretation of Contracts Civil Code California.

The following nine sections are from Part II, Title III, Civil Code California, on "Interpretation of Contracts", which comprises twenty-seven sections, i.e., 1635 to 1661, inclusive. The title was copied from David Dudley Field's (Proposed) New York Civil Code, 1865, and may be taken to be made up of rules of interpretation of universal acceptance.

Civil Code California.

"1635. All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code."

"1636. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

"1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

"1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

"1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

"1647. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

"1650. Particular clauses of a contract are subordinate to its general intent."

"1652. Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

Proceedings in Congress 1908-1911 Whereunder San Francisco Sought to Obtain Concessions from the Government in Respect of Hetch Hetchy Valley and Other Public Lands; the Five Bills Introduced by Representative Raker in the 63rd Congress, 1st Session, 1913; the Text of Section 6 in each of the Five Bills and Proceedings in respect of and Amendments to Section 6 of the last of the Five Bills which was the one which became the Law.

Proceedings in Congress 1908-1911.

There had been efforts to obtain Congressional concessions from the Government in respect of Hetch Hetchy Valley and other public lands within the period May 16, 1908 and April 25, 1911, but the measure failed of enactment.

The proceedings were in the sessions of Congress below mentioned and in the volumes of the Congressional Record at the pages noted below:

60th Congress, 1st Session, May 16, 1908; 42:6440; 60th C. 2nd S., January 6, 1909, February 1, 1909, February 8, 1909; 43:566, 1662, 2065; 61st C., 1st S., March 19, 1909, March 22, 1909; 44:115, 136, 62nd C., 1st S., April 25, 1911, 47:625.

There was an interregnum of two years until Mr. Raker proposed the legislation which eventuated in The Raker Act.

63rd Congress 1st Session 1913.

Five Hetch Hetchy Bills were introduced by Mr. Raker in the 63rd Congress, 1st Session, and referred to the House Committee on the Public Lands. (The proceedings in respect thereof appear in 50 and 51 Congressional Record.)

The first four were early forms of the grant and the fifth, H.R. 7207, was the bill which with amendments became "The Raker Act," approved December 19, 1913. (38 Stats. 242.)

Section 6 in the Five Bills introduced by Mr. Raker.

Section 6 appeared in all five bills and in the Act as it became a law with varied texts as below.

(1) H.R. 112, introduced April 7, 1913:

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county, but the rights herein granted to said city and county of San Francisco are for the exclusive use of said city and county and its inhabitants, and for such other municipalities and the inhabitants thereof in the territory surrounding San Francisco Bay, or nearby, in California, as may, with the consent of said city and county, hereafter participate in the enjoyment of the privileges herein granted."

(2) H.R. 4319, introduced April 25, 1913:

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said city and county."

(3) H.R. 6281, introduced June 23, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 4319, except that the word "a" has been inserted in the latter immediately preceding "municipal water district".

(4) H.R. 6914, introduced July 18, 1913:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

(5) H.R. 7207, introduced August 1, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 6914, except that the words "or the electric energy" are added in H.R. 7207 immediately following the words "the water".*

*(The words "or the electric energy" were evidently added in Committee to H.R. 6914, for Representative Thomson said September 2, 1913 "When this bill was being considered by the committee I offered an amendment to Section 6, . . . by adding the words 'or electric energy'." (50 Cong. Rec. 4096, c. 2 foot. Following this amendment, Mr. Raker included the words in this, his fifth Bill.)

(6) Proceedings in Respect of and Amendments to Section 6 of the Bill H.R. 7207, which became The Raker Act.

As noted, it was the fifth Bill introduced by Mr. Raker, H.R. 7207, which became The Raker Act.

Section 6 of H.R. 7207, was amended between introduction and enactment and as enacted read as follows:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee; Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The proceedings in the House in respect of H.R. 7207 here follow—The Bill was introduced August 1, 1913.

On August 5, 1913, it was reported favorably by the House Committee on the Public Lands, without amendment, and referred to the Committee of the Whole.

The bill was discussed on various days subsequent to August 5, 1913 and up to September 3, 1913, when it passed the House.

On August 29, 1913, Mr. Raker explained the occasion for his several bills and that he had introduced H.R. 7207 on August 1, 1913, to embody all of the conclusions which had been reached in the House Committee on the Public Lands (50 Cong. Rec. p. 3900, c. 1 foot) up to that day.

Two amendments to Section 6 were agreed to on August 30, 1913, (a) one striking out the proviso at the end of

Section 6 and substituting therefor the proviso found in the enacted bill (50 Cong. Rec. p. 3998, c. 2 foot);* and (b) one striking out the words "for such corporation or individual" immediately preceding the words "to sell or sublet."** (50 Cong. Rec. p. 3999, c. 2 middle.)

Provisions of The Raker Act Imposing Obligations Upon the Municipality in the Nature of a Price Paid for the Grant.

Among the provisions in the Act which are referable, wholly or in part, to the price paid by the Municipality to the Government are the provisions following providing that it shall.

1. "pay to the United States the full value of all timber and wood cut, injured or destroyed on or adjacent to any of the rights of way and lands" (Sec. 4; R. 17:31-18:3).

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*The proviso attached to Section 6 in H.R. 6914 and H.R. 7207, supra, read as follows:

"Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

The substitute agreed to on August 30, 1913, which appears in the Act as enacted, reads as follows:

"Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the Government of the United States."

**The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Theodore Roosevelt's Dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the five Hetch Hetchy Bills introduced in the House, 63rd Congress, 1st Session, 1913 by Mr. Raker, i.e., H.R. 112, 4319, 6281, 6914 and 7207; but were stricken from Section 6 of the then Bill (7207) on motion of Representative Murray of Oklahoma on August 30, 1913 (50 Cong. Rec. 3999). The change was agreed to by Mr. Raker, who said that the section meant the same whether the words remained or were stricken.

2. "permit any road or trail which it may construct . . . to be freely used by the officials of the Government and by the public" (Sec. 4; R. 19:1-5)

3. "permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain . . . together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials" (Sec. 4, R. 19:6-14)

4. "assign, free of cost to the United States, all roads and trails built" (Sec. 7, R. 21:15-16).

5. Commencing with December 19, 1918 (five years after the passage of the Act) to pay the United States $15,000 annually for ten years; $20,000 annually for the next ten years; and $30,000 annually for the remainder of the term unless altered by Congress (Sec. 7, R. 21: 17-27)

6. construct specified scenic roads or trails and a wagon road and "such roads and trails [as are] made necessary by this grant, and as may be prescribed by the Secretary of the Interior"; lay and maintain a water pipe or otherwise provide for camp purposes at a specified point (Section 9 (p), R. 32:20-33:21)

7. "furnish water at cost to any authorized occupant within one mile of the reservoir" (Section 9 (q), R. 33:28-30)

8. "reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed" (Section 9 (q), R. 33:31-34:3)

9. bear the expense of all investigations and decisions in respect of the subject of the grant incurred by the Department of the Interior (Section 9 (r); R. 34:4-10)

10. convey to the United States "any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act". (Section 9 (t); R. 34:15-22)

11. furnish water to the military reservations in or near San Francisco at "the actual cost of said water to said City and County for all the water so furnished" (Section 9 (u), R. 34:28-35:11).

The Provisions of The Raker Act Involving Forfeiture or Reverter, and the "Condition" or "Conditions" Thereof, none of which involve Forfeiture or Reverter, but the Enforcement of which is provided for in Section 9, subsection (u).

Section 5 in terms provides for a forfeiture and Section 6 for a reverter. Forfeiture was provided in Section 5 in each of the five Hetch Hetchy Bills introduced by Mr. Raker in the 63rd Congress, 1st Session, in 1913.

The proviso in Section 6 carrying the reverter clause did not appear in any one of the five Bills as introduced by Mr. Raker, but was added by an amendment to the last of them on August 30, 1913.

Section 11, containing the word "conditions", mentioned only because in point of number it was later than Section 9, subsection (u), appeared in the fourth and fifth Bills introduced by Mr. Raker, H.R. 6914, July 18, 1913, and H.R. 7207, August 1, 1913.

Section 9, subsection (u), never appeared in any of the Bills, but was added September 2, 1913, the day immediately preceding the passage of the Act in the House, which was September 3, 1913. (R. 72 ft., 75 ft.) The proceedings in the House which led to the inclusion of Section 9, subsection (u), are shown in the Answer of the Municipality filed in the District Court. (See R. 70-75.)

Thus we see that in point of enactment, Section 9, subsection (u) was last, and that provision, as will be seen (R. 70-75) was to wipe out all possibilities of forfeiture except, say, for the reasons covered by Section 6 and the provisions of Section 6.

We now quote the above mentioned provisions of Section 5, Section 6, Section 9, subsection (u), and every other provision in the Raker Act wherein the word "condition" or "conditions" appears. (These words appear once in Section 1, eleven times in Section 9, and once in Section 11.)

(1) Sec. 1. "under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture" (R. 14:26-29)

(2) Sec. 5. "That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the

works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit" (R. 19:26-20:16)

(3) Sec. 6. ". . . Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States" (R. 21:6-12)

(4) Sec. 9. "That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:" (R. 22:16-19)

(5) Sec. 9, sub-sec. (a), subd. Fourth. "The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee" (R. 23:17-21)

(6) Sec. 9, sub-sec. (d). "upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water" (R. 25:30-26:2)

(7) Sec. 9, sub-sec. (1). "no power plant shall be interposed on the line of the conduit except by the said

grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein" (R. 29:15-19)

(8) Sec. 9, sub-sec. (m). "That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years" (R. 29:26-29)

(9) Sec. 9, sub-sec. (n). "and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development" etc. (R. 31:18-23)

(10) Sec. 9, sub-sec. (p). "That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine" (R. 32:20-24)

(11) Sec. 9, sub-sec. (q). ". . . it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed" (R. 33:31-34:3)

(12) Sec. 9, sub-sec. (r). "That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations . . . which . . . involve expense . . . then such expense shall be borne by said grantee" (R. 34:4-10)

(13) Sec. 9, sub-sec. (s). "That the grantee shall file . . . its acceptance of the terms and conditions of this grant" (R. 34:11-14)

(14) Sec. 9, sub-sec. (u). . . . "Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act" (R. 35:15-25)

(15) Sec. 11. "That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State" (R. 36:1-11)

Proceedings in Congress to show that the Raker Act was not designed to grant water rights and that the necessary rights were already possessed by the Municipality.

Representative Raker, August 29, 1913:

"The bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water." (50 Cong. Rec. p. 3900, c. 1 middle.)

Representative Ferris of Oklahoma, September 2, 1913:

"We, of course, must not invade the State laws where parties have prescribed water rights." (50 Cong. Rec. p. 4096, c. 1 ft.)

Senator Borah of Idaho, October 4, 1913:

"The Government is not undertaking to regulate and cannot control the waters of the State of California." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Pittman of Nevada, October 7, 1913:

". . . this bill does not grant any water rights to anyone; it does not take away any water rights from anyone;" (50 Cong. Rec. 5494, c. 1 ft.)

Senator Smoot of Utah, December 1, 1913:

". . . the only way in which San Francisco can have her needs supplied is under the laws of California. San Francisco can make appropriations of the water, and I understand she has already done so. If she has made these appropriations, all that prevents her from going on with the project is that she must have an act of Congress authorizing her to construct a pipe line over the public domain and build a reservoir. . . . That will give her all the rights Congress can give her. It will give her a right of way to enable her to use every drop of water to which she is entitled. She is not entitled to a gallon of water she has not appropriated under the laws of California, no matter how many bills we pass in Congress purporting to grant her more." (51 Cong. Rec. p. 13, c. 1 middle.)

Senator Thomas of Colorado, December 3, 1913:

". . . the city of San Francisco is not attempting, and and could not if it would attempt, to secure a grant

from the Government of the United States of any water power whatever." (51 Cong. Rec. p. 132, c. 1 ft.)

Senator Lippitt of Rhode Island, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Smoot of Utah, December 3, 1913:

"The Government of the United States does not own any water." (51 Cong. Rec. p. 136, c. 1 middle.)

Proceedings in Congress to show that the Raker Act was a grant by a proprietor and not by a Sovereign.

Representative Raker, August 29, 1913:

"The theory on which this bill is drawn is that the United States, having sole jurisdiction over the national park, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantee." (50 Cong. Rec. p. 3900, c. 1 middle.)

Secretary Lane, August 29, 1913 (testimony given by him at an earlier hearing but laid before the House on the day just stated):

"The general principle of the bill is that these lands belong to the Federal Government and that we have control of them. The water originates in them, the water flows through them, and we have control over the dam site, and if we are to allow these lands to be submerged we have got the right to make certain conditions. Certainly no one can come in and use

lands in a national park without our consent, and if you give consent you have got the right to make conditions." (50 Cong. Rec. p. 3907, c. 1 middle.)

Representative French of Idaho, August 30, 1913:

"As has been stated in the report of the Committee on the Public Lands, the theory on which this bill is drawn is that the United States, having the sole jurisdiction over the Yosemite National Park, the Stanislaus National Forest, and the public lands that would be involved in the grant, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantees." (50 Cong. Rec. p. 3967, c. 1 middle.)

Representative Thomson of Illinois, August 30, 1913:

"This is not so much a legislative act or grant as it is a contract between the Government and San Francisco and these other cities, in which we, representing the Government, not only may but should place proper and reasonable conditions. That Congress has the right to impose such conditions there can be no question." (50 Cong. Rec. p. 3979, c. 1 foot.)

Representative Mann of Illinois, September 2, 1913:

"It is a principle of law that Congress in granting a right can grant it on conditions and provide for its ending as it pleases, regardless of courts." (50 Cong. Rec. p. 4104, c. 2 middle.)

Representative Mondell of Wyoming, September 2, 1913:

"I do not claim that the Federal Government may not fix conditions on a grant of a right of way. . . . It might make a condition as to a grant of right of way over which water is to be carried that the city shall not charge over a certain amount for the water fur-

nished to its citizens. That is a condition that I should not consider necessary or proper, but it does not impair a constitutional right. What I claim is that Congress has no power to shorten the sovereignty of a State. . . . In the bill are a lot of provisions they think may be enforced, contrary to that rule, through the medium of a contract. I do not think it is good legislation." (50 Cong. Rec. p. 4111, c. 1, middle.)

Senator Borah of Idaho, October 4, 1913:

"The Government . . . is simply attaching a condition to a specific grant which it is making to the city of San Francisco, as a proprietor and not as a sovereign." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Lippitt of Rhode Island, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Brandegee of Connecticut, December 4, 1913:

". . . if the Government is the proprietor of land I have no doubt whatever of the power of the Government to sell its land or to grant any less estate than a fee simple under whatever conditions it may attach, which are, in my opinion, the same as those which any other proprietor of land may attach." (51 Cong. Rec. p. 183, c. 1 top.)

Senator Borah of Idaho, December 5, 1913:

"I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land,

and I have no doubt of the proposition that the Government can attach no other conditions than an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government." (51 Cong. Rec. p. 286, c. 2 middle.)

California Constitutional Provisions Respecting Franchises.

Article XIV, Section 1 of the California Constitution of 1879 provides:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied etc. [here provision is made for the annual fixing of rates by the governing legislative bodies of municipalities, a power since then transferred to the Railroad Commission]. . . . Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use."

The provision which gave rise to the so-called "constitutional franchises" is Article XI, Section 19 of the California Constitution of 1879, amended in 1911. (See *Russell v. Sebastian*, 233 U.S. 195.)

Both texts follow.

In force from 1879 to 1911, Art. XI, s. 19, Constitution:

"§19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

In force since 1911, Art. XI, s. 19, Constitution:

"§19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation

may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. [Amendment adopted October 10, 1911.]"

Opinion of Acting Solicitor Wright of the Interior Department, dated July 20, 1925, holding contract of July 1, 1925, one of agency and not one of sale. (R. 359-366.)

(This Opinion, first made public in the Opinion of Secretary Ickes of August 24, 1935 (R. 234:31-235:8) was received in evidence subject to a motion to strike and later stricken out (Assignment of Error No. 11, R. 535).)

"Department of the Interior
Washington

Address only
Secretary of the Interior

July 20, 1925

The Honorable,
The Secretary of the Interior.
My dear Mr. Secretary:

There is before me, by reference from you, a certain contract executed on July 1, 1925, by duly authorized members of the Board of Public Works of the City and County of San Francisco, on the one part, and by the Pacific Gas and Electric Company, a corporation acting through its Vice-President and General Manager, thereunto duly authorized, on the other part. The contract, full copy of which is hereto attached, purports to provide for the utilization of certain electric energy owned by the party of the first part through the plant and equipment of the *part* of the second part, as a temporary expedient, the occasion being the existence of a large

amount of power owned by the City and County but not now available for consumption for the reason that the City and County own no distribution system of their own. The recitals in the contract quite fully explain the occasion, the purpose, and the methods of the plan for its immediate utilization.

I am asked whether this contract is a contract of sale. The question requires determination because section 6 of the Raker Act (Act of Decem. 19, 1913, 38 Stat., 242), under which the City and County of San Francisco acquired a franchise to develop and has developed this power, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Assuming that the proviso refers to the franchise in its entirety ('rights hereby granted', i. e., by the Act), and eliminating language not pertinent to the matter immediately to be considered, section 6 comes to this:

> That the grantee is prohibited from ever selling or letting to any corporation * * * * the right to sell or sub-let * * * * the electric energy sold or given to it * * * * by the said grantee.

This is a prohibition, the breach of which might be considered as a failure to observe one of the conditions specified in the Raker Act. And the proviso

to paragraph 'u' of Section 9 of the Act reads as follows:

> That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings, in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

The City having completed the Moccasin power plant as a part of the development of the Hetch Hetchy project, it now can deliver electric energy to the extent of 420,000,000 kilowatt hours to a point near Newark; but Newark is several miles from the City of San Francisco. The City owns no transmission line from Newark to the City. Nor does it own any distribution system in the City. The Pacific Gas and Electric Company owns both a transmission line and a distribution system. The City has started proceedings looking to the ultimate acquisition of this system. It has at present no funds with which to purchase or to build a system of its own. Consequently, there will be a great waste of electric energy and a great loss of potential revenue therefrom to the City and to taxpayers unless some plan within the power of the grantee under its franchise, the Raker Act, is devised for its present utilization. At least two years will elapse before the City, under favorable conditions, can be the owner of a distributing system capable of marketing the power which it owns. In this situation, the contract recites, the City 'employs' the Company as

its temporary distributor. The City agrees to produce, deliver, and consign all its energy output (save any such portion as may be reserved for certain city requirements). The Company agrees to take the entire energy output, to connect the City's transmission line with its own at Newark, installing all necessary equipment and meters for measurement, to transmit to San Francisco through its own system so much of the same as may be required to light the streets and to meet other municipal requirements and to supply street railroads and other consumers, to furnish all necessary peak load and steam standby service, to collect for consumers the charges which shall not exceed lawfully established rates, and to make due accounting to the City. The contract provides for the exclusion of such portion of energy as the City may be required to furnish to irrigation districts or municipalities under the terms of the Raker Act. It is agreed that the transmission and distribution losses will amount to 24 per cent of the energy consigned to the Company at Newark. To arrive at the amount of compensation which the Company should receive for its service and the amount that the City should realize from the power so developed, transmitted, and consumed, the average revenue received by the Company from consumers in San Francisco in 1924 is taken as the basis: 2.383 cents per kilowatt hour. This rate is to be applied to 76 per cent of Newark energy. The Company is to collect from consumers and is to account for and pay over to the City 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of energy consigned and delivered to it at Newark. The difference, i. e., 73.065 per cent x 2.383 cents x 76 per cent of Newark energy is to be retained by the Company as its compensation for services under the con-

tract. On this basis the City will receive something in excess of $2,000,000 annually. The contract recites that it is a temporary arrangement between the parties for the distribution of this electric energy to cover the period that must elapse before the City is in a position to attend directly to the distribution of its product. It may be terminated at any time by either party on one day's notice. The contract, of course, covers other points, none of which, however, bears materially upon its fundamental nature; and it is with that that I am concerned.

I am unable to say that this contract effects a sale of the energy to the Company. It certainly does not so appear on its face. It is rather to be described as a contract of agency. It does not import a transfer of the property in the electric energy to the Company for a price in money. From its terms alone, I can not reach the conclusion that the Company acquires an absolute title to the power it takes over and distributes. To be sure, possession will pass to the Company, but that would be true of an agency. A sale includes not only the idea of divesting a seller of title but of vesting such title in the buyer. I can not deduce that as a fact or an intention from the sole evidence of the transaction now before me, the contract. Time alone will develop other evidential factors which may yield a certainty in conviction on that point: e. g., the manner in which the Company deals with the consumer. Will it bill the product sold in the name of the City, or in its own name as agent of the City, or in its own name as though it were the owner? These elements, factors of decision, are not present; and there are other things, incident to management

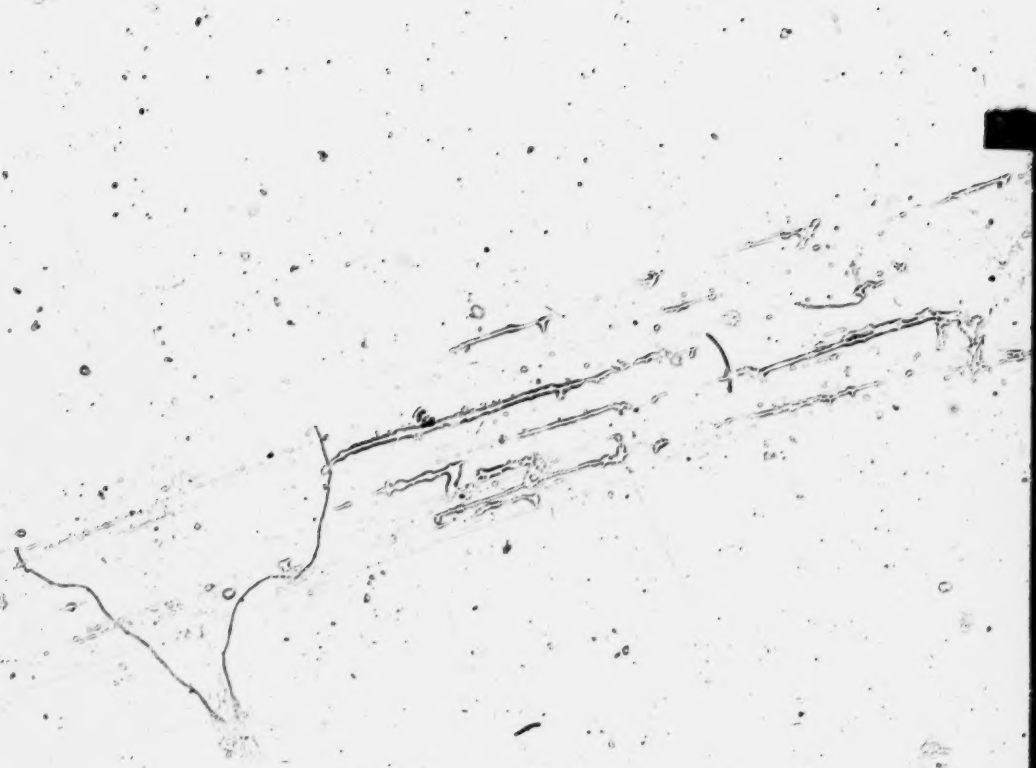
or operation, which might have a bearing. They are not now present, I must take the contract as it is.

The contract certainly provides for the delivery by the City to the Company of its property, this energy. The Company takes the consignment which is to be sold to the consumer. It appears to be much like a consignment to a commission merchant. The liability of the Company is estimated on expected proceeds; at least, it is to account on a basis that contemplates the sale of the entire product to consumers. There might be room for some argument on this point inasmuch as the amounts to be divided between the City and the Company are computed on the amount delivered and consigned, with due allowance for customary loss. But when it is considered that *all* said energy will be used, consumed, and paid for by the ultimate purchaser, this provision in the contract loses much of its significance as pointing to a sale. It is fundamental that to constitute a sale there must be a transfer of title. If, under this contract, the Company acquires a title to the energy the minute it receives the same at Newark, then it would have the rights of ownership and could dispose of it as it pleased. I do not think it can be said from the evidence that the terms of the contract afford that this is so. I am constrained to the conclusion, judging the matter by the only factors now in being—i. e., the conditions and the terms of the agreement—that this is not a contract of sale or lease, but rather one of agency, and that no evidence of a violation of the inhibitions of section 6 of the Raker Act is presented by this contract; and I so advise you.

Respectfully yours,

C. EDWARD WRIGHT

Acting Solicitor."



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In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

RESPONDENT'S PETITION FOR REHEARING, OR IN THE ALTERNATIVE, FOR CERTAIN CHANGES IN THE OPINION; ALSO MOTION FOR STAY OF MANDATE.

Counsel for Respondent:
JOHN J. O'TOOLE,
City Attorney
DION R. HOLM,
Assistant City Attorney
ROBERT M. SEARLS,
Special Counsel
GARRETT W. McENERNEY,
Of Counsel

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CITY AND COUNTY OF SAN FRANCISCO,
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RESPONDENT'S PETITION FOR REHEARING, OR IN THE ALTERNATIVE, FOR CERTAIN CHANGES IN THE OPINION; ALSO MOTION FOR STAY OF MANDATE.

The Respondent, The City and County of San Francisco, a Municipal Corporation, petitions the Court for a Rehearing, or in the alternative, for certain changes in the Opinion; also for a stay of the Mandate.

PREFATORY STATEMENT.

It is important for the City to know precisely what it may not do under Section 6 of the Raker Act as now definitively interpreted, and precisely what it is free to do.

It is not necessary to say that the City has been relying on the revenue from its electric energy through the past

fifteen fiscal years and that it cannot longer do so until it is in a position to meet the requirements of Section 6 as interpreted by this Court, which will necessarily involve considerable time; and in the interim, close down its power houses, waste its potential energy and carry its water around the power plants at a cost of between two and three hundred thousand dollars unless the injunction is suspended by the District Court. Indeed, it will be forced to provide at the beginning of its fiscal year, July 1st, for other revenue unless the District Court should suspend the injunction during the forthcoming fiscal year, before the beginning of that year. It is therefore important that there be no ground for dispute as to the meaning of the Court's decision.

It is clear that in the circumstance the City is under requirement to make heavy capital expenditures but it would be unfortunate if any of the expenditures were made in the belief that they were required and it should later turn out that they were avoidable.

The prohibition of Section 6, so we submit, has been turned into a mandate (Opinion, p. 2, line 34; p. 3, lines 6-7); and the mandate is broader in instances than the prohibition. Of these, we presently take one: the matter of "distribution". The mandate requires "municipal performance of . . . distribution". (Opinion, p. 4, lines 14-16; see, also p. 8, lines 21 and 24; p. 3, line 9, p. 6, line 27.)

We submit this would be "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function", to use the language of Mr. Justice Brandeis, speaking for a unanimous Court in *Wallace v. Cutten*, 298 U.S. 229, 237 (Br.

Res. pp. 91-92); and is contrary to the position taken by the Government in the Circuit Court of Appeals where it said "The Government has never argued 'that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent' **and there is nothing in the decree [R. 168] which requires that the City make distribution without an agent.** . . . and the Government has never contended to the contrary" (Govt. Supp. Br. CCA, p. 8, quoted in Br. Res. p. 81); and it is likewise contrary to the concessions in the Petition for Certiorari, page 7, footnote 5, last line, and to the following from the Brief for the United States, page 12, where it is said: "While **the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City, it does contend" etc.** (Br. Res. p. 82.)

This position was confirmed by the Government after the opinion herein had been delivered, according to a Washington, D. C. dispatch of the Associated Press, dated April 22, 1940, reading as follows:

> "Government attorneys said the decision would permit San Francisco to acquire a municipal distribution system or arrange with a private power company for the distribution of the energy without any control over the energy being invested in the private company."

But, in a letter dated Washington, D.C., May 6, 1940, The Secretary of the Interior wrote The Mayor of San Francisco: "It is the view of this Department that Section 6 of the Raker Act, as construed by the Supreme Court

. . . only permits of municipal distribution of such energy".

Thus the Secretary would have Section 6 read as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet **[or distribute]** the water or the electric energy sold or given to it or him by the said grantee."

(The Decree of the District Court says nothing about distribution, R. 168.)

If "**or distribute**" is thus to be read into Section 6, claim will be later made for reading into the Section other language found in the Opinion, including quoted matter, with the result that the City might be later met with the claim that Section 6 should read, for instance, as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet **[or distribute]** the water or the electric energy sold or given to it or him by the said grantee; **[and all development (construction) work must be performed by the grantee or a municipal agency] [competitive conditions must be maintained against private utility companies]** and **[water and electric energy must be sold at cost]**."

The idea that Section 6 required the Municipality to operate its own distributing system was rejected in the Opinion of Secretary Ickes as follows (R. 244:19-27):

Secretary Ickes' Opinion.

"The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, **while true** (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment." (Boldface ours.) (Br. Res. pp. 168-169.)

Uhl (a taxpayer) v. Badaracco, et al. (Supervisors and Mayor of San Francisco), 199 Cal. 270, 280 (1926) (cited above in Secretary Ickes' Opinion) dealt with the authority of Congress as a law making power to enact the prohibitions of Section 6. The case arose after the contract here under review, i.e., that of July 1, 1925, between the City and the Company, had been in operation for more than one year; and involved the authority of the City to use the revenue collected under the contract to buy or build new power plants. The Court held that the City should apply the revenues from the Hetch Hetchy project (a) first to the payment of operating costs and (b) the balance to the service charges on the Hetch Hetchy bond issues. The defendants (Supervisors and Mayor of the City) argued that in view of the prohibitions of Section 6 of the Raker Act the City was entitled to use the revenues from the project to build publicly owned power plants. The Supreme Court of California held (p. 280):

". . . Congress has no power to create or force a public utility upon the City, and under the organic law of the City a public utility can be acquired only

in one of two ways: First, from funds derived from taxes levied for that purpose; second, from funds derived from the sale of bonds issued for such purpose."

It is therefore important in this Petition to review the Opinion of this Court in the hope that it may appear that the case can be reheard with profit; and failing that, that certain changes in the Opinion should be made to avoid misinterpretation of portions thereof (even by fanciful argumentation) and to change other portions which may have been due to inadvertence.

Under the rule, this Petition must be on file May 17, 1940, and the Mandate will issue on the following day unless the motion for a stay thereof, pending the disposition of this Petition, be granted. This would call for a shutting down of the power houses, say, not later than May 22nd, and heavy capital expenditures to by-pass the water.

GROUNDS OF THIS PETITION AND MOTION.

The grounds of this Petition and motion are:

First: The Court holds that Section 6 of the Raker Act is valid and plainly expresses its purpose. (p. 11, lines 19, 20 Opinion.) We ask the Court to reconsider its ruling (p. 3, line 20 to p. 7, line 7) that the "plain purpose" of the Act is to be ascertained, *not from its wholly unambiguous language,* but from the assertions of five out of ninety-six Senators and *seven* out of 435 members of the House of Representatives, made in Congressional debate. The language of the Senators had to do with the

general purpose of the Raker Act and not with respect to the meaning of Section 6, and the authoritative views of the House are those quoted in Brief for Respondent, pp. 61-63, not mentioned in the Opinion, and which serve to show that the views attributed in the Opinion to Representative Thomson of Illinois (p. 3 foot) have been misunderstood.

Second: If Congress intended by the enactment of the Raker Act to accomplish the purposes recited by the several citations from Congressional Debates set forth in pages 3-6 of the Court's opinion, the Court has mistakenly concluded that the Contract between respondent and Pacific Gas and Electric Company of July 1, 1925 *violates,* or is subversive of those purposes.

Third: Future disputes respecting the meaning of the Opinion (p. 3, line 17) will be obviated by clarification.

Fourth: In view of the signal failure of the Government to introduce into the record in this case any evidence whatever that the Pacific Gas and Electric Company either (1) exercises a monopolistic control of the supply of electric energy to the people of San Francisco, or (2) makes any profit out of the utilization of the public domain granted under the Raker Act, the order of this Court should not have been for an unqualified affirmance of the judgment of the District Court, but, at the most, for a reversal and a new trial, at which the Government may have opportunity to prove, if it can, and Respondent may have an opportunity to rebut the contentions, made in Government briefs and Arguments on certiorari with respect to the above points, not one of which points was supported either by pleading or proof in the District Court.

Fifth: The tragically disastrous consequences to the Respondent and its thousands of taxpayers that will inevitably flow from the unqualified affirmance of the District Court's decision, justify a stay of this Court's mandate.

ARGUMENT.

POINT 1. THE LANGUAGE OF SECTION 6 OF THE RAKER ACT IS PLAIN AND UNEQUIVOCAL AND NEEDS NO CITATION FROM CONGRESSIONAL DEBATES TO INTERPRET EITHER ITS MEANING OR PURPOSE.

Respondent pointed out at great length in its brief in this Court that, until the Petition for Certiorari was filed herein, there had *never* been any question in the mind of either the Respondent's officials or of Counsel for the United States or of any Secretary of the Interior charged with administration of the Raker Act (including Secretary Ickes), but that Section 6 prohibited a *sale for resale,* nothing further (Respondent's Brief pp. 1-109.) The language of the section speaks for itself, even though its intent may be strengthened by supplying an obvious ellipsis or referring to its historical setting. Respondent is not to "sell" to a private corporation the "right to sell" the energy "sold or given" to that corporation by Respondent. How can this be converted into a prohibition against "employing" a private corporation, or for that matter a private individual, to "transmit and distribute" the energy to consumers? Respondent, as a public corporation, can act only through officers, agents and employees. Why is there anything more objectionable in having its corporate functions performed for it and in its name by

corporate agents rather than by individual agents or employees? This question remains unanswered.

Why should it not be held that Congress in limiting its prohibition to a "sale" of the "right to sell," intended only to prevent that absolute transfer of control over the title price and terms of disposal of the energy that alone would remove the Respondent from sole control and enjoyment of the benefits of the grant? Why should it be held that this plain language had a hidden meaning of preventing San Francisco from *utilizing the only available, existing facilities for distribution of its energy,* and forcing it to discard these facilities and embark on distribution through a publicly owned system? Congress, had it seen fit, to do so, might have incorporated specifically such a mandate for a publicly owned *distribution system* in the Act. Congress, however, did not impose such a requirement and no justification appears for the Courts to supply a judicial enactment of the omitted language.

In *Wallace v. Cutten,* 298 U.S. 229 (1936) (cited supra) Mr. Justice Brandeis, affirming the judgment involved and speaking for a unanimous Court, said (pp. 236-237):

> "The Government argues that . . . the literal construction thus given (in the court below) to pp. 6 (b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act. . . .
>
> "It would be inappropriate for us to discuss these, and other arguments presented. The language of pp. 6 (b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said (by us in another case) . . . 'The statute was evidently drawn with care. Its language is plain

and unambiguous. *What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably (possibly) by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'* ''

The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

United States v. Chase, 135 U.S. 255, 261 (1890).

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Hadden v. Barney, 72 U.S. (5 Wall.) 107 (1866).

"I think there is always danger in giving effect to what is called the equity of a statute, and that it is

much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

Lord Tenterden, C. J. in *Brandling v. Barrington*, 6 B. & C. 467, 108 Eng. Rep. 523, 527 (1827).

"I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14."

Holroyd, J., same case (p. 527).

"The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act."

Crawford v. Spooner (1846) VI Moore 1, 13 Eng. Rep. 582, 585.

The Opinion, page 4, footnote 10, cites three decisions to support its resort to Congressional debates. We think that these cases do not justify the use made of the Congressional debates in the Opinion.

The first of the three cases rests upon the decision of this Court in 166 U.S. 290, and it is necessary, in order to give a comprehensive idea of these authorities that quotation should first be made from 166 U.S. 290 and then from

the three cases cited in the Opinion. Accordingly, this course is followed.

United States v. Freight Association, 166 U.S. 290, 318-319.

"All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U.S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story 648, 653; *Reg. v. Hertford College*, 3 Q.B.D. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. (Cases cited, *supra*.)"

Standard Oil Co. v. United States, 221 U.S. 1, 50:

"Although debates may not be used as a means for interpreting a statute (United States v. Trans-Missouri Freight Association, 166 U.S. 318, 41 L. Ed. 1019, 17 Sup. Ct. Rep. 548, and cases cited) that rule in the nature of things is not violated by resorting to

debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

Federal Trade Commission v. Raladam Co., 283 U.S. 643, 650:

"It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied. In Ho Ah Kow v. Nunan, 5 Sawy. 552 . . . Mr. Justice Field, speaking for himself and Judge Sawyer, said (p. 560): 'The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied'."

Humphrey's Executor v. United States, 295 U.S. 602, 625:

"While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 650."

We respectfully submit that the Opinion goes far beyond these tried and tested rules of statutory construction and should be reviewed and modified.

POINT 2. NEITHER IN DESIGN NOR IN PERFORMANCE DOES THE CONTRACT OF JULY 1, 1925 VIOLATE ANY OF THE PURPOSES WHICH THE OPINION (pp. 3-6) ASCRIBES TO CONGRESS IN THE ENACTMENT OF THE RAKER ACT.

We ask the Court to again consider carefully the following facts, uncontradicted in the record:

1. Physical control of the electric energy is admittedly in the City's hands up to the time when it passes into the Pacific Gas and Electric Company's transmission lines at Newark thirty-five miles from San Francisco.

2. The acts of the Company's load dispatcher in throwing the switches in and out which control the actual physical delivery of the energy to consumers in San Francisco are themselves controlled by two factors: one, the consumer's demand which determines when and how much energy will be taken and consumed—(energy can only be transmitted when consumers are ready to take it); two, the obligations of the Company under its contract to take and deliver to San Francisco consumers *all* the City's energy, at the agreed deliverable load factor, diminished only by actually ascertained transmission losses (24%). If the City were distributing the energy through a municipally owned plant its delivery would be controlled by consumers' demands, not by its plant capacity if it exceeded such demand. The City is at all times in a position to enforce upon the Company compliance with its obligations to receive and deliver the energy to consumers. It therefore controls the physical delivery of the energy to the same extent that it would if it were handled through its own employees. *The element of control is there, in the City,* whether it be exercised through the authority of an employer over employees or of a principal over its agent.

3. The City *has prescribed* the rates to be charged consumers through clauses first and eighth of the con-

tract which provided that they must not exceed lawfully established rates, i.e. rates fixed by the State Railroad Commission. The City certainly had the power to say that the rates charged for its energy should not exceed Railroad Commission Schedules. Rate making is a complex business. If, having in mind the fact that its energy must be supplemented by the Company's energy in order to meet consumers' demand, and the fact that Company's energy under law must be sold at Railroad Commission rates, the City elected to adopt the same schedules for its own energy, this certainly was an exercise of price control. It would have been no broader legally if, instead of incorporating Commission schedules by reference it had set them forth in full in the contract. Reductions in rate schedules made by the Railroad Commission from time to time have been enjoyed by the consumers of the City's energy to the same extent as if the City had made the reductions itself. If the Company had failed to apply the reductions to that energy the City would have been at all times in a position to enforce the contractual obligation to make them applicable, just as much as if it ordered its own employees to put them into effect under public operation.

4. The one-day-cancellation clause in the Contract leaves the City in a position to enforce its rights thereunder or immediately to terminate the arrangement. This is an additional safeguard to its municipal control of operations under the contract.

5. There can be no monopoly where there is public control of price and potential competition in business.

"A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to,

> or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control." *United States v. Trans-Missouri Freight Ass'n* (U. S.) 58 Fed. 58, 82, 7 C.C.A. 15, 24 L.R.A. 73.

It is true that the Pacific Gas and Electric Company owns all the power distribution facilities in San Francisco at the present time. But it does not have a monopoly, first, because its rates are subject to control of the State Railroad Commission, and second because the City itself always stands as a potential competitor. The City might, if its voters so decided, install a complete duplicate distribution system, although such a course entails physical and economic wastes not attractive to contemplate. The City may, when its voters so declare, carry out its oft recited intent to acquire and own the Company's distribution facilities. It has the power of eminent domain and can take them over if that course should become necessary. It is obvious that the City competes with the Company in the generation of power and that the threat of competition in distribution, coupled with power to compete when the electorate authorizes it, is sufficient to offset any fears of monopoly expressed in the quoted portion of Congressional debates.

6. There is no evidence or pleading in the Record here of either (a) high rates paid by consumers for Hetch-Hetchy energy under this contract, or (b), any profit made by private capital out of the utilization of the public domain. The Government is the plaintiff in this case. It neither alleged nor proved that rates charged consumers of electric energy in San Francisco are high, or

that they would be any lower under public ownership of distribution facilities. Indeed the record shows through the testimony of the Government's own witness (R. 287) that rates have been repeatedly reduced by the Railroad Commission, whose rate schedules must not be exceeded under the Contract. Neither did the Government allege or prove that the Pacific Gas and Electric Company makes any profit whatever out of the utilization of the public domain by the City. On the contrary, the evidence shows without contradiction (R. 435) that the Company's retained percentage of revenues collected was calculated entirely on the basis of allowing actual operating and maintenance charges, taxes, depreciation, and a reasonable return on the Company's own capital *invested in the distribution and stand-by plant* used in the City's service. Such profit as exists from utilization of the granted lands is therefore clearly included in the City's share of the revenue, and the desires of Congress, as expressed in the quoted portions of debates to that end, have been fully satisfied. A suggestion was made at the argument of this case by counsel for the Government that a certain document—not in the record—which was handed this Court discloses that a larger profit could be made by the City under municipal operation. We desire to note that the claim amounts to just this—that if the City invested over fifty million dollars more in a municipally owned distribution system and operated it, it might expect to make a return on that capital at then existing rates. The report does *not* prove that the City would make one cent more profit out of the utilization of the public domain or that rates to consumers would be one mill lower.

POINT 3. FUTURE DISPUTES RESPECTING THE MEANING OF THE OPINION WILL BE OBVIATED BY CLASSIFICATION.

The disputes which we have in mind may arise out of the two following matters:

First.

The only question upon which Certiorari was asked was whether Section 6 (a) forbade sale of energy for resale or (b) forbade the sale of the right to sell. This was the only question respecting the interpretation of Section 6 which was submitted for decision. The Court has held that interpretation (b) is the correct one, and the Respondent submits that was all that the Court decided respecting the meaning of Section 6.

In arriving at its conclusion and in supporting it, the Court uses language arguendo which the Government interprets to involve additions to the scope of Section 6 which the Respondent thinks the Court never intended.

This is shown by the letter, May 6, 1940, from The Secretary of the Interior to The Mayor of San Francisco, supra, pp. 3-4, which involves the idea that language in the Opinion, including quoted matter, respecting the general purpose and object of the Raker Act, is to be carried into Section 6 and thereby enlarge the prohibitions thereof. The authorities which we cite, supra pp. 9 to 13, show that this should not be done.

Second.

Section 6, in full, reads as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by

> the said grantee: Provided, that the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the Government of the United States."

The Government said in the Circuit Court of Appeals "The second clause of Section 6, stated in the form of a proviso, plainly *does not relate to the same subject matter as,* or restrain, modify, or otherwise affect, *the first clause.* The word 'Provided' has no significance here, simply serving to separate or distinguish the two clauses". (Govt. Supp. Br. CCA, p. 18, line 30 to p. 19, line 3, quoted in frontispiece to Add. Br. for Respondent in Opp. to Certiorari.)

In the Opinion (p. 3, lines 14-19) it is said:

> "The 'right to sell or sublet the . . . electric energy' so generated by the City cannot, as a consequence of Section 6, be sold or let. And in case of any attempt to 'sell, assign, transfer, or convey [the rights granted], this grant shall revert to the government of the United States'."

The connection of these two sentences in the Opinion may give occasion to an argument (no matter how unsound) that the City **has sold** the "right to sell or sublet the . . . electric energy", and hence the Hetch Hetchy grant has reverted to the Government of the United States.

We feel confident that no such idea was in the mind of the author of the Opinion when writing it, nor in the Court in adopting it; and if so, the fact should be indicated in some appropriate way.

Congress did not grant San Francisco the "right to sell water or electric energy". It granted certain lands and rights in the public domain as sites for and aids to the construction and operation of a municipal water supply and hydro-electric power system. It is these rights which are forbidden to be sold under penalty of forfeiture by the second sentence of Section 6. Confusion in the public mind may be caused by combining this sentence with the first and we respectfully submit that it is unnecessary and should be deleted.

On the other hand, if the Opinion was designed to hold that the proviso of Section 6 does relate to the first clause (contrary to the position of the Government stated above), the Respondent submits that there should be opportunity for re-argument on this point, at least, as it never had an opportunity to deal with this construction as one existing in the case in view of the above concession of the Government. Moreover, there was no challenge of what we said on this point (Br. Res. pp. 32-35), and there is nothing within the ambit of the Decree of the District Court (R. 168-170), which called upon the Respondent to argue the point.

POINT 4. AS A RESULT OF THE STATE OF THE RECORD UNDER POINT 2, THIS COURT SHOULD NOT HAVE AFFIRMED THE DISTRICT COURT'S DECISION WITHOUT MODIFICATION, BUT, IF IT BELIEVED THAT SOME MERIT MAY EXIST IN POINTS MADE BY THE GOVERNMENT FOR THE FIRST TIME ON APPEAL, WHICH ARE UNSUPPORTED BY THE RECORD, AT THE MOST A REVERSAL AND ORDER FOR NEW TRIAL SHOULD HAVE BEEN THE ORDER IN ORDER TO AFFORD BOTH PARTIES AN OPPORTUNITY TO PRESENT EVIDENCE.

The language of the Act prohibits sale for resale and had always been so construed—by Secretary Ickes and

everybody else, including the District Court. (R. 120.) The Contract under review by its express terms is *not* a contract of sale for resale. Now, if there should be any provision of the contract, or any detail of its execution, which causes this Court to feel that some unexpressed intent of Congress is being violated notwithstanding this fact, then, we respectfully submit the decision of the District Court should either be reversed and a new trial ordered in the light of this Court's interpretation, or else the order should be for such a modification of the judgment below as will permit a marketing arrangement to be agreed upon which will not conflict with said Congressional intent as interpreted by this Court. Unless this is done, the District Court may feel itself bound by the mandate herein to forbid any type of marketing arrangement, pending acquisition of a publicly owned system and a tremendous waste of potential electric energy and taxpayer's money will ensue—all without benefit to anyone.

POINT 5. WE ASK THAT THE MANDATE BE STAYED.

Unless the mandate herein is stayed, remittitur will issue of course on May 17th, 1940. The consequences of this decision are of tremendous importance to the three-quarters of a million inhabitants of San Francisco. It is obvious that the City cannot forthwith commence public distribution of power or, without some allowance of time, negotiate a new contract with the Power Company which may overcome the objections of the Court and Secretary of the Interior. The City has believed and contended in good faith that its existing agreement was valid. It was given support in this belief by the decision

of the Circuit Court of Appeal for the Ninth Circuit reviewed herein. It will lose a revenue of $2,200,000 per year which will necessitate adding 22¢ per $100 to the tax burden of its residents if the injunction granted below goes into force. In addition, it will face a large investment, for which no provision has been made, to by-pass its municipal water supply around the Moccasin Power Plant. This water is absolutely essential to the very lives of its inhabitants.

Under these circumstances, we urge upon the Court a careful review of the situation and facts set forth in this petition and earnestly ask for a stay of mandate. Further, if the Court feels that reargument would be of any assistance in this review, counsel for Respondent will be available for its presentation at the Court's convenience.

Dated, May 14, 1940.

Respectfully submitted,

JOHN J. O'TOOLE,
City Attorney
DION R. HOLM,
Assistant City Attorney
ROBERT M. SEARLS,
Special Counsel
GARRET W. MCENERNEY,
Of Counsel
Counsel for Respondent.

COUNSEL'S CERTIFICATE.

We hereby certify that the foregoing Petition is presented in good faith and without intent to hinder or delay the progress of the above entitled proceeding.

Dated, May 14, 1940.

JOHN J. O'TOOLE,
City Attorney
DION R. HOLM,
Assistant City Attorney
ROBERT M. SEARLS,
Special Counsel
GARRET W. MCENERNEY,
Of Counsel
Counsel for Respondent.

pp. 1, 3

SUPREME COURT OF THE UNITED STATES.

No. 587.—October Term, 1939.

United States of America, Petitioner; vs. City and County of San Francisco, a Municipal Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 22, 1940.]

Mr. Justice Black delivered the opinion of the Court.

By the Raker Act of December 19, 1913,[1] Congress granted the City and County of San Francisco,[2] subject to express conditions, certain lands and rights-of-way in the public domain in Yosemite and Stanislaus National ~~Parks~~ Forest. The Act in terms declared that this, known as the "Hetch-Hetchy" grant, was intended for use by the City both in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system "for generation and sale and distribution of electric energy."

Upon application of the Secretary of the Interior, the United States brought this suit[3] in equity charging the city with disposing of power through the Pacific Gas & Electric Company, a private utility, in violation of Section 6 of the granting Act. Section 6 provides "That the grantee [the City] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee: Provided, That the rights hereby granted shall not

[1] c. 4, 38 Stat. 242.

[2] The City and County of San Francisco is a municipal corporation of California and will be referred to here as the City.

[3] Section 9(u) of the Act contains the following: "*Provided, however,* That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." 38 Stat. 250.

be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The District Court concluded that the City was violating Section 6 by the sale and distribution of Hetch-Hetchy power through the Pacific Gas & Electric Company, a private utility. Accordingly, the City was required by injunction alternatively to discontinue such disposal of the power or cease further use of the lands and rights granted it under the Act for generation and transmission of electric energy.[4] The Circuit Court of Appeals reversed,[5] finding that the private utility was merely acting as the City's agent in the sale and distribution of Hetch-Hetchy power and holding that Section 6 does not prohibit such sale and distribution of that power by a private utility.

Here, as in the courts below, the City has defended the sale and distribution by Pacific Gas & Electric Company of power originating at Hetch-Hetchy upon the grounds that such disposition does not violate the prohibitions of Section 6; that imposition of these prohibitions was not within the constitutional authority of Congress; and that if Section 6 is [redacted] and has been violated, the United States is not entitled to injunctive relief in equity.

First. Prohibitions of Section 6. In the City's view, Section 6 does not preclude private utilities from all participation in the ultimate sale and distribution of Hetch-Hetchy power. The City insists that the Section, so construed, does no more than prohibit the City from selling Hetch-Hetchy power to a private utility for resale to consumers and therefore permits consignment of the power to the Company, as agent of the City, for sale and distribution. On the contrary, the Government's position rests upon the claim that Pacific Gas & Electric Company is not in reality selling and distributing Hetch-Hetchy power as consignee and agent but as purchaser for resale; that the grant to the City was made upon the mandatory condition that this power be sold solely and exclusively by the City directly to consumers and without private profit in

[4] 23 F. Supp. 40. The District Court stated: "In order that the City may face its problem and comply with its obligations under Section 6 of the Raker Act, the Court will make its injunction issuable forthwith, but effective six months from the date of its issue". p. 53.

[5] 106 F. (2d) 569.

order to bring it into direct competition with adjacent privately owned utilities; and that Section 6 not only withholds the right of selling for resale but also prohibits the City "from ever selling or letting" to any private corporation "the right to sell or sublet the . . . electric energy sold or given to it . . . by the City." The language of the Act, its background and its history require the construction given Section 6 by the Government.

From its provisions,[6] it is apparent that the Act conditions the grant upon and contemplates the development, sale and distribution of electrical power by the City itself "for municipal and commercial use" on a scale to be gradually stepped up over a period of years. "The . . . grantee shall develop and use hydroelectric power for the use of its people and shall . . . sell or supply such power for irrigation, pumping, or other beneficial use." The "right to sell or sublet the . . . electric energy" so generated by the City cannot, as a consequence of Section 6, be sold or let. And in case of any attempt to "sell, assign, transfer, or convey [the rights granted], this grant shall revert to the government of the United States."

From the statement of the Congressman responsible for the application of the prohibitions of Section 6 specifically to electric energy,[7] it is clear that as enacted Section 6 was understood to prohibit the City from transferring to a private utility the right to sell Hetch-Hetchy power (the Government's contention) and not merely to forbid sale of power as a commodity for resale, as the City would have us hold:

"Mr. TAYLOR of Colorado. We have got to let the municipality sell to individuals or consumers.

"Mr. THOMSON of Illinois. Yes; but not the right to sell some one else the power.

"Mr. TAYLOR of Colorado. Supposing that San Francisco sells a certain block, you may say, of its power to Alameda. Has not Alameda got the right to resell that to its inhabitants?

"Mr. THOMSON of Illinois. Mr. Chairman, in answering the question of the gentleman from Colorado, I would like to call his attention to the fact that the subject of sale as printed in this section is not the power or the water, but the right to sell the power or the water.

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[6] See Section 9(m).

[7] 50 Cong. Rec., Part 4, p. 4906. Mr. Thomson of Illinois was a member of the committee that considered and reported the Bill.

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"Mr. RAKER. That [the word "individual"] really is intended to cover any person who might attempt to buy this electric power or right. I think it would cover everybody outside of a corporation, the intention being to prevent anybody getting in and getting a right and sub-letting it."[8]

In its Report on the Bill, the House Committee on Public Lands stated that the provision of Section 6 "acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco."[9]

From the congressional debates on the passage of the Raker Act can be read a common understanding both on the part of sponsors of the Bill and its opponents that the grant was to be so conditioned as to require municipal performance of the function of supplying Hetch-Hetchy water and electric power directly to the ultimate consumers, and to prohibit sale or distribution of that power and water by any private corporation or individual.[10] On the floor of the House, the following took place between the Bill's author and other Representatives:

"Mr. SUMNERS. Does San Francisco own its own lighting plant now?

"Mr. KAHN. No; it does not.

"Mr. RAKER. I understand it does not.

"Mr. KAHN. It does not own its own water supply. Its present water supply is furnished by a private company.

"Mr. RAKER. The Spring Valley Water System.

"Mr. SUMNERS. Is it the purpose of this bill to have San Francisco supply electric power and water to its own people?

"Mr. RAKER. Yes.

"Mr. SUMNERS. Or to supply these corporations, which will in turn supply the people?

"Mr. RAKER. Under this bill it is to supply its own inhabitants first. . . ."[11]

These views were in accord with the recommendation of the then Secretary of the Interior, as set out in the Report of the Public Lands Committee of the House:

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[8] *Id.*, p. 3999.

[9] H. R. No. 41, 63rd Cong., 1st Sess., p. 11.

[10] Reference to congressional debates may be made to establish a common agreement upon the general purpose of an Act. Standard Oil Co. v. United States, 221 U. S. 1, 50; Federal Trade Commission v. Raladam Co., 283 U. S. 643, 650; Humphrey's Executor v. United States, 295 U. S. 602, 625.

[11] 50 Cong. Rec., Part 4, p. 3905.

"I think that it is very proper that the Federal Government should use whatever power it has over the public lands, over the parks, and over the forests, to compel the fullest use of these waters, and indirectly to require through its power to make conditions, the lowest possible rate for consumers."[12]

The theme—of an intent to require public utilization of Hetch-Hetchy power independently of private utilities—recurred at a later stage of the debate in the House:

"Mr. GRAY. . . .

"As I understand the bill, it provides for the furnishing of water, and also for power for commercial use. . . .

" . . . if these works here are to be constructed to serve the baseness of commercialism, it is the vilest of all vandalism. My suggestion here to you is to strike out of this bill all the commercial profit. . . .

"Mr. KENT. [a Member of the California delegation and a supporter of the measure] Mr. Chairman, I should like to suggest to the gentleman from Indiana [Mr. GRAY] that this bill is strictly drawn in the public interest, that there is no possibility of selfish gain, and that no corporation or individual can obtain any benefit whatsoever from this bill. It is for the benefit of the people of California."[13]

In the Senate, Senator Thomas, a Member of the Committee reporting the Bill, said:

" . . . San Francisco needs electric power, and California needs development in electric power just as much as she needs ownership in water, . . .

" . . . She is anxious to extend her spheres of municipal usefulness, but she is in the grip of a power monopoly as well as that of the Spring Valley Co.

" . . . This scheme appeals to me, Mr. President, so far as the power is concerned, because the city of San Francisco as a municipality will be the owner of it, the manufacturer, the distributer of it."[14]

And the words of Senator Norris, also a Member of the reporting Committee and a leading sponsor of the bill, on the day of its final passage through the Senate, illuminate just what the Raker Act was intended to accomplish:

" . . . I said that I was in favor of this bill to a great extent for the reason that it developed this power. This power will come in to

[12] House Reports, Vol. 1, Nos. 17-92, 63rd Cong., 1st Sess., 1913, p. 25.

[13] 50 Cong. Rec., Part 4, p. 3991. See also 69 Cong. Rec., Part 9, pp. 9239 *et seq.*

[14] 51 Cong. Rec., Part I, pp. 126, 136.

competition with the various water-power companies of California, and there are lots of them there.

" . . . this proposition is to harness that power and to put it to public use not to give it to a private corporation. . . .

"Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

" . . .

"These make in all, as I have counted them, 18 corporations controlling the power in the vicinity of San Francisco that are under the control of this one corporation. [Pacific Gas & Electric Company.]

" . . . When you sum them all up you will find that they own practically all of the hydroelectric power of the State of California, and this bill, if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition.

" . . . Conservation does not mean dealing out these resources to private capital for gain. It is not necessary to accuse those corporations of doing any wrong; but here will be an instance where the cheapest power on earth will be developed and where it will be sold at cost."[15]

Opponents of the bill themselves recognized that its regulatory conditi ns were designed to insure distribution of power from Hetch-Hetchy through a municipal system in San Francisco. Before final passage in the Senate, opposition had practically narrowed down to the power provisions of the measure,[16] and these provisions contemplated a publicly owned and operated power sys-

[15] 51 Cong. Rec., Part 1, pp. 343, 344, 347. Senator Pittman, one of the Bill's sponsors and a Member of the reporting Committee, stated that the Bill provided "absolutely that neither this water nor this power can ever fall into the hands of a monopoly." 50 Cong. Rec., Part 6, p. 5473.

[16] See, e. g., views of Senator Smoot, who opposed the measure: " . . . I was opposed to the regulations that were put in this bill, and that is what I was opposed to more than any other thing. I wanted the question of regulations taken out of the controversy and the bill reported to the Senate without those regulations in it.

"

"Mr. President, I do not think there ought to be any misunderstanding about this matter. The Senator himself, I think, will admit that the principal object of this bill is to provide for the creation of power. . . . "

" . . . I will, moreover, say that it is my opinion that the reason San Francisco wants this particular dam site is for the power that she thinks can

tem.[17] Immediately before the vote in the Senate, Senator McCumber, opposed to the power provisions of Section 6, offered a sweeping amendment which would have omitted that Section and all other provisions relating to the generation, sale and distribution of Hetch-Hetchy power.[18] But his amendment was defeated.[19] And despite this articulate opposition to the policy embodied in its power features, the Act was passed.

To limit the prohibitions of Section 6 of the Act narrowly to sales of power for resale without more, as the City asks, would permit evasion and frustration of the purpose of the lawmakers. Congress clearly intended to require—as a condition of its grant—sale and distribution of Hetch-Hetchy power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company. It is not the office of the courts to pass upon the justification for that belief or the efficacy of the measures chosen for putting it into effect. Selection of the emphatically expressed purpose embodied in this Act was the appropriate business of the legislative body.

The admitted facts shown by this record required the District Court to find—as it did—that the City was violating Section 6 in permitting sale and distribution of Hetch-Hetchy power by the Pacific Gas & Electric Company. Now, as it has been doing since contracting with the City in 1925, the Company sells and distributes that power as follows:

"Power generated in the City's plant is transmitted to the Company at Newark, about thirty-five miles from San Francisco. There

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be developed cheaper than from any other source, and at the same time get a large supply of water. That is my personal opinion." 51 Cong. Rec., Part 1, pp. 304, 314, 360.

17 "The people who ride on street-cars, the people who use electric lights, the people who are now using gas, those who eventually will use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation or monopoly." Senator Norris, 51 Cong. Rec., Part 1, p. 347.

18 Senator Clark, of Montana, also opposed to the power provision of the Bill, said with reference to Senator McCumber's amendment: " . . . The Senator from North Dakota [Mr. McCumber] has prepared an amendment to the bill which accomplishes all the purposes which the proponents of the bill claim are desired, leaving out the objectional features, which have nothing whatever to do with the water supply of the city of San Francisco." 51 Cong. Rec., Part 1, p. 184.

19 *Id.*, pp. 383, 384, 385.

the power is delivered to the Company's sub-station and thereafter is under the Company's complete control. The Company distributes and sells this power to its customers in San Francisco and elsewhere exactly as it handles other power which it generates, buys or owns. Consumers of the power are billed by and pay the Company. The City buys Hetch-Hetchy power from the Company exactly as do other consumers. The City receives monthly payments from the Company on a fixed basis set out in the contract. The price received by the City has remained constant from 1925 to date although rates to the consumers have varied in the interim. In the event of the refusal, failure or inability of the Company to take the available output of the City's plant in accordance with the agreement, the amount of energy which the City could have delivered is the basis of making the monthly payment, and the Company must pay for power delivered to it whether actually disposed of by resale or not. The rate paid by consumers for the Hetch-Hetchy power is not fixed by the City, as it could be under the Constitution of California,[20] but is fixed by the State Railroad Commission just as the price of all other power sold by the Pacific Gas & Electric Company in California is fixed.

Thus, in brief, the City does not itself distribute and sell the power directly to consumers; it has not provided competition with the private power company; and it has transferred the right to sell and distribute the power to a private power company in violation of the express prohibition of Section 6 of the Act.

Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of Section 6. Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain. The City has in fact followed a course of conduct which Congress, by Section 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the City and the power company to what was actually done, we see that the City has—contrary to the terms of Section 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy

[20] Under Art. XII, Sec. 23 of the California Constitution municipalities are exempt from rate regulation by the State Commission. See Pasadena *v.* R. Comm., 183 Cal. 526; Water Users, etc. *v.* R. Comm., 188 Cal. 437.

power. There remain only the determinations whether the prohibitions of Section 6 are constitutional and can be enforced in equity.

Second. The prohibitions of Section 6 are challenged by the City as an unconstitutional invasion of the rights of the State of California on the ground that they attempt to regulate the manner in which electricity shall be disposed of in San Francisco. And the City therefore insists that these prohibitions must be considered only as covenants in a contract between the City and the United States. Upon this premise, the City has argued here, as it did in the Court of Appeals, that alleged equitable defenses render the covenants unenforceable.

When the Raker Bill was before Congress, the City filed with the Public Lands Committee of the House a brief and argument in support of the Bill. Citing authorites, including this Court's opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose "the conditions set forth in the Hetch-Hetchy bill."[21] After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions.[22]

Article 4, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations.[23] "And it is not for the courts to say how that trust shall be administered. That is for

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21 H. R. No. 41, 63rd Cong., 1st Sess., p. 41. Similar views were entertained in Congress upon the effect of the conditions. See, e. g., Senator Walsh of Montana: "We are making a grant of rights in the public lands to the city of San Francisco, and we may impose just exactly such conditions as we see fit, and San Francisco can take the grant with all those conditions or it can let it alone." 51 Cong. Rec., Part 1, p. 69.

22 Cf. Daniels v. Tearney, 102 U. S. 415, 421; Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 29; Wall v. Parrott Silver & Copper Co., 244 U. S. 407, 411; St. Louis Co. v. Prendergast Co., 260 U. S. 469, 473; Booth Fisheries v. Industrial Commission, 271 U. S. 208, 211.

23 United States v. Gratiot, 14 Pet. 526, 527.

Congress to determine."[24] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it.[25]

Third. Finally, on the basis of numerous objections to the District Court's judgment, assigned as errors in the Court below and pressed here, the City denies the Government's right—upon a balancing of equities—to relief by injunction even if the present disposition of Hetch-Hetchy power be in violation of the Act.

However, after consideration of all these objections, we are satisfied that this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued. The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted. Congress provided "That the grantee [City] shall at all times comply with and observe on its part all the conditions specified in this Act and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." Pursuant to this legislative mandate, the present suit was instituted to enforce covenants exacted from a grantee of rights in the public domain by a Congress sympathetic with the local needs of San Francisco but also jealous of its own responsibility to dispose of such rights in a manner deemed by it most likely to render their benefits widespread. The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared

[24] Light v. United States, 220 U. S. 523, 537.

[25] Cf. Ellis v. United States, 206 U. S. 246, 256; see Ruddy v. Rossi, 248 U. S. 104.

policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary.[26]

A substantial part of the City's argument rests upon its claim that the Department of the Interior in the period from 1913 to 1937 construed Section 6 to forbid no more than sale of power for resale. We are asked to accept these administrative interpretations. And in addition the City suggests that conduct of the Department, of which these interpretations were a part, is sufficient to create an estoppel against the Government. Whether the Department at any time ever did more than merely to tolerate sale and distribution of Hetch-Hetchy power by the Company as a temporary expedient is doubtful. Certain it is, however, that in 1935 the Secretary of the Interior declared the City's disposition of the power through the Company to be a violation of Section 6, demanded discontinuance of this violation without success and thereafter instigated this proceeding. We cannot accept the contention that administrative rulings—such as those here relied on—can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that, "... the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."[27]

The judgment of the Circuit Court is reversed. The judgment of the District Court is affirmed and we remand the case to it.

It is so ordered.

Mr. Justice McREYNOLDS is of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

Test:

A true copy.

Clerk, Supreme Court, U. S.

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[26] Cf. Oregon & Cal. R. R. *v.* United States, 238 U. S. 393, 436, 438.

[27] Utah Power & Light Co. *v.* United States, 243 U. S. 389, 409.